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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION,
APRIL TERM, 1885,
EASTERN DIVISION,
SEPTEMBER TERM, 1885,
AND
MIDDLE DIVISION,
DECEMBER TERM, 1885.

BENJAMIN J. LEA,
ATTORNEY-GENERAL AND REPORTER.

VOLUME XV.

NASHVILLE:
ALBERT B. TAVEL, LAW PUBLISHER.
1886.

Entered according to Act of Congress, in the year 1886, by
BENJAMIN J. LEA,
In the office of the Librarian of Congress, at Washington.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION,

JACKSON, APRIL TERM, 1885.

E. M. HAYES *et al.* v. D. L. FERGUSON *et al.*

1. **LEASE. Covenants.** A covenant for quiet possession is not broken until eviction, actual or constructive.
2. **SAME. Constructive Eviction. Rescission.** Where, under the same instrument, two distinct tracts of land, a large and a small tract, were leased for a series of years at a rental of so much per acre of tillable land a year, the lessors covenanting for quiet possession, the smaller tract being in litigation, which fact the lessees knew, and during the time the lessors lost the suit, whereupon the lessees abandoned the lands, and notified the lessors that they had rescinded the contract, contrary to the wish of the lessors, who stated to the lessees that they should be protected in their possession: *Held*, 1. That the losing of said suit did not constitute a constructive eviction. And 2. That an actual eviction of the smaller place would not have warranted a rescission of the contract, but an abatement of the rent.
3. **SAME. Fire Insurance.** During a lease of real estate, providing that if the buildings, or any of them, be destroyed by fire, the lessees "are to erect at their own expense such buildings as will answer their purpose," fire insurance policies on the gin house, etc., were issued to the lessors, but made payable to the lessees, who paid the premiums, and the insured property was destroyed by fire during the

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time, when the lessees collected the money on same, but declined to apply it to rebuilding the property destroyed by fire: *Held*, 1. That the lessors were entitled to recover of the lessees the amount collected by them on the policies, and that such provision in a policy of insurance merely designates the person to whom the loss is to be paid, and shows that he is a person who *may have* an interest in its being so paid, and that such stipulation has no more effect upon the contract of insurance than a stipulation that the loss, if any, should be deposited in a specific bank to the credit of the party insured. 2. That the lessees were not entitled out of the proceeds of the policies of insurance to the loss of the use of the gin, etc., for the balance of the term after the destruction of the property by fire.

4. *SAME. Abandonment. Receiver. Compensation.* After the abandonment of the lands by the lessees the lessors sued the lessees and applied for a receiver to rent out the lands, and by consent of the parties a receiver was appointed: *Held*, the lessees should pay the compensation of the receiver.
4. *SAME. Surveyor. Compensation.* In order to find out the amount of tillable land rented, a surveyor was employed to ascertain same: *Held*, the lessors should pay the surveyor's fees.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

WRIGHT & FOLKES for complainants.

A. P. LILES, HUMES & POSTON and HARRIS & TURLEY for defendants.

WILSON, Sp. J., delivered the opinion of the court.

On January 2, 1878, A. J. Hayes, and his wife, complainant E. M. Hayes, leased for five years to D. L. Ferguson and H. C. Hampson certain lands in Mississippi county, Arkansas, at a specified annual rental, payable on or before the 15th day of Novem-

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ber, each year, during the continuance of the lease. The leased lands belonged equally as tenants-in-common to Mrs. Hayes and her three children, two of the latter being minors at the date of the lease.

The lands conveyed contained about a thousand acres, embracing a tract known as the Morgan Point place, and another small tract, as stated in the lease, "sometimes called the Perry place."

Hayes and wife covenanted in the lease to keep their lessees "in the quiet enjoyment of the possession" of the lands during the entire term of five years, and the lessees agreed to pay \$4 an acre annually for all the open and tillable land, and to do certain fencing. It is recited in the lease that all the lands embraced in it were at the time "under and subject to a trust deed or mortgage for the sum of about \$4,000, and interest thereon, due on or about March 1, 1879, and it is provided that if the lessors fail to pay this debt, or to secure delay in enforcing its collection, the lessees have the right to pay it, and to be substituted to all the rights of the holders of the mortgage.

It is also recited in the lease, that the lessees are not "to be held responsible for accidents and misfortunes, but should the buildings, or any of them, be destroyed by fire or other unavoidable accidents," then the lessees "are to erect at their own expense such buildings as will answer their purpose." The lessees were given the privilege to clear up and cultivate, free of rent, any of the land except "the grass lands and lands that had been once cleared up."

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On February 15, 1878, the Factors & Traders' Insurance Company and the Sun Mutual Insurance Company of New Orleans, each issued policies of insurance for \$1,500 to A. J. Hayes and wife and children, on a gin-house, grist-mill, gin stands, engine, boiler, etc., as the property of Hayes, wife and children, located on the premises leased to Ferguson and Hampson.

It appears that these policies were taken out and the premiums paid by Ferguson and Hampson, and the policies contain this clause: "Loss, if any, payable to Ferguson and Hampson."

This insured property was destroyed by fire June 2, 1878. A. J. Hayes made proof of the loss and damage as required by the provisions of the policies, and under an adjustment made with the companies, they paid \$1,849 to Ferguson and Hampson in sixty days after the fire. A. J. Hayes died in Memphis in 1878.

It appears from the record, that the small tract known as the Perry place, mentioned in the lease, was in litigation in the courts of Arkansas in the ejectment suit, brought June 8, 1877, by A. J. Hayes and wife, E. M. Hayes, and A. J. Hayes as next friend of his two minor sons, against R. P. Perry, who, it seems, held it, claiming title as a purchaser from a party who had bought it at a tax sale. A receiver was appointed in this litigation, and rents for this Perry place were paid to him for the years 1878 and 1879 by Ferguson and Hampson; and so far as appears, this was at the time, entirely acceptable to them and Hayes. This suit was finally dismissed

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at the fall term, 1879, of the circuit court for Mississippi county, at the cost of plaintiffs, and a writ of possession directed to issue to restore Perry to possession. The writ of possession issued February, 1, 1880, and was executed on the 17th of the same month.

On December 31, 1879, after the judgment of the circuit court in Arkansas in favor of Perry, but before the actual issuance and execution of the writ of possession, Hampson and Ferguson notified complainants that they had elected to rescind the contract of lease and intended to surrender the premises, giving several reasons therefor, the main one being that they had been evicted. They were immediately notified in return by complainants not to surrender to any one, and especially to Perry, and that they would be protected in their possession. We gather from the record, although the point is not made entirely clear in the brief, that defendants did abandon the leased premises and moved their property to another plantation owned or operated by them, before the actual issuance and service of the writ of possession from the court in Arkansas.

Several efforts were made by complainants, through their counsel, to effect a settlement with defendants in respect to the money due for rent of the leased lands, and that collected on the insurance policies.

The parties failing to agree, the bill in this cause was filed January 17, 1880, seeking to recover the rents due under the lease for the years 1878 and 1879, to hold the defendants to the contract for the whole

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five years, and to compel them to pay over the insurance money with interest, or to apply it to rebuilding the gin-house, grist-mill, and other property on the leased premises destroyed by fire.

The bill also asked for the appointment of a receiver to take charge of and rent out the property pending the litigation, or until the expiration of the lease. By consent of parties, a receiver was appointed, who has rented out the Morgan Point plantation for the unexpired period of the lease at \$4 per acre per year for the open and tillable land. Upon the hearing, the chancellor gave complainants a decree for the balance of the rents due for the years 1878 and 1879, amounting to \$752.12; also held that they were entitled to recover the insurance money with interest, less the premiums paid, amounting to \$225, and \$168.75, the adjusted loss on the grist-mill.

The chancellor held that defendants were liable for \$30, one-half of the cost of having the lands cultivated by Ferguson and Hampson surveyed, and the amount ascertained; and also, that they were bound for \$50, one-half the compensation allowed the receiver. He refused to hold defendants for the rent for the years 1880, 1881 and 1882. From this decree both parties appealed.

The Referees have reported that defendants were not evicted from any portion of the leased lands; that they, without sufficient cause, abandoned the premises, when notified that they would be protected in their possession; that they should be held liable for rent for the years 1880, 1881 and 1882, upon the basis of

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\$4 per acre, for 277¹/₁₀ acres, the amount cultivated by them, and for which they were liable for rent for the year 1879.

They also report, that the defendants are liable for the insurance money with interest, less \$168.75, the loss of grist-mill, and the value of the use of said gin for four and a half years, and that they were not bound to rebuild the destroyed property. Their report further holds, that the rents received by the receiver should go to defendants, but should be applied as credits on the rents due from them.

The Referees recommend, in taking the account upon the basis of their report, that defendants be credited for each of the five years with the sum of \$60 for rent on Perry place.

They recommend that the defendants are not entitled to a credit for \$200 attorney's fees and \$30 costs, paid by them in the suit in Arkansas against Perry to recover the Perry place, as the same were not provided for in the lease, and it not appearing that complainants ever authorized these payments or ratified them, as they did the lease and the payments thereunder.

Defendants employed, at the request of A. J. Hayes, a man and paid him \$50 to guard the Perry place and keep off Perry, and the report recommends that this be allowed as a credit. But inasmuch as it does not appear in the record what the loss of defendants is in the loss of the use of the gin, etc., for the four and a half years, the time embraced from their destruction by fire until the expiration of the lease,

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they recommend that the cause be remanded for taking proof as to the value of this use, and for taking an account upon the principles recommended in the report.

Both parties have excepted to the report, and under their exceptions the whole case is before us. We will not take up the exceptions *seriatim*, but will announce certain general principles applicable to the controlling facts, as we understand them from the record, which determine and settle the rights of the parties. It is to be noted that the covenant in the lease is for quiet possession, and not for *seizin*. And, as was said by McKinney, J., in the case of *Kincaid v. Brittain*, 5 Sneed, 124, "the legal effect of the covenant of warranty and for quiet enjoyment, is very different from that of the covenant for *seizin*. The former are regarded as assurances to the purchaser of a permanent, undisturbed possession of the premises conveyed, and, therefore, are only broken by his *eviction*, actual or constructive, until when the purchaser can have no remedy, but must await, at whatever hazard of ultimate loss, the event of his involuntary *disseizin* by the paramount title, before he can be heard to complain of a breach of either covenant."

Moreover, it is clear from the evidence of the defendants themselves, that they knew of the litigation over this Perry place when they took possession under the lease, for one of them testifies that the attorney employed to prosecute the suit for Hayes refused to take charge and bring it until they agreed to secure his fee, and this they did, and afterwards paid it. In

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addition to this, they paid the rent, \$60 per year, for the place, to the receiver appointed by the court in Arkansas, for the years 1878 and 1879, without demurrer at the time, so far as appears from the record.

The suit was instituted by A. J. Hayes, the husband and father of complainants, and it is not made certain that the complainants knew any thing of it until after its determination in the fall of 1879, after the death of A. J. Hayes, and when notified by defendants that they had elected to rescind the contract because of their eviction. Upon being thus notified, complainants refused to accept a surrender of the premises, and directed defendants to hold possession, promising to protect their possession against the result of the litigation against Perry.

It is clear, also, that the reasons given in their notice of December 31, 1879, for electing to rescind the contract, and abandoning the premises, were studied, evasive, and, in great part, untrue, as applied to their relations to the subject-matter of the contract. They were not actually evicted from the premises. Under the facts in the case, taken in connection with the covenant in the lease, they were not constructively evicted, even if the doctrine of constructive eviction, as applied to paramount titles, was applicable to cases of this character. We hold, therefore, that the Referees were correct in reporting that the abandonment of the leased premises, by defendants, under the facts and circumstances of the case, was voluntary and without sufficient cause. We also hold, under the facts, that

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even an actual eviction from the Perry place, would not have justified an abandonment of the contract, and the remaining plantation embraced in the lease.

The lease, as to the rents to be paid, although of tracts in gross, was of open and tillable land, and the rental was to be measured by the number of acres cultivated at so much per acre; and, under the facts developed in this record, the actual loss of the Perry place would not warrant a rescission of the contract, but an abatement of the rent.

The contention cannot be sustained that the Perry place was the material inducement to the lease, and that the Morgan Point place was practically valueless without it, for the receiver appointed in this case, immediately rented the Morgan Point place without the Perry place, at an annual rental of \$4 per acre for the open land, the same price agreed to be paid by defendants in the lease for both. The report of the Referees, therefore, holding the defendants bound for the rents, according to the terms of the lease, for the five years, is correct.

The second point of serious contention is the insurance money. It is not free from difficulty, and we are not aware that the precise point involved has ever been before this court. While the authorities are not in fatal conflict on the general principle involved, there is great conflict in the result reached in its application by different courts. The policies in this case were taken out in the name of Hayes and wife and children, and insured *their* property and interest, not the leasehold interest of the defendants. The contract

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was to insure the property of Hayes, wife and children, and the loss or damages paid under it was the contract value of their property, and not the value simply of the lease interest therein of the defendants. The provision in the policies, "loss, if any, payable to Ferguson and Hampson," cannot, in legal effect, convert the contract into one insuring simply the interest of Ferguson and Hampson.

As was said by the court in the case of *Grosvenor v. Atlantic Insurance Company*, 17 N. Y., 391, construing a policy containing a similar clause, "they are merely the appointees of the party insured to receive the money." That was a case where the property of a mortgagor was insured and the policy contained a clause that the loss, if any, was to be paid to the mortgagee. And says the court, "the provision in the policy as to the loss payable to mortgagee had no more effect upon the contract of insurance than it would if it had been provided that the loss, if any, should be deposited in a specific bank to the credit of the party insured. There is nothing in the language of the policy in which the court can adjudge that, in legal effect, it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest, shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who *may have* an interest in its being so paid."

The defendants in this case did have an interest in

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the policies being paid to them. A fair and equitable construction of the lease, imposed upon them the duty, and such was to their interest, to rebuild the gin-house and other property destroyed by fire, or to put up buildings of the same character, suitable to carry on the operations of the plantations. It is manifest, we think, that it was the intention of the parties, that the insurance money should be applied to replacing the property destroyed by the fire, as in erecting buildings and getting machinery that would meet the wants of the farm as did the property destroyed. This being so, the defendants are not entitled to retain it. Upon the theory of the Referees, that they were not bound, under the lease, to restore or replace the property destroyed by fire, having refused to apply the insurance money to that purpose, and having, as they say, wrongfully abandoned the premises, thereby breached their contract of lease, we are unable to see upon what principle they are entitled to retain this money, a sum equal to the value of the use of the gin-house, mill, etc., destroyed, for four and a half years, the period of time elapsing from their destruction until the expiration of the lease. They had the right to apply the insurance money to replacing the destroyed property, in order to its use by them under the lease. That was their interest in the policies. Even if it were optional with them to rebuild, the insurance money did not belong to them for any other purpose or to any greater extent than was involved in the use of the buildings and property destroyed; and when they voluntarily surrendered the premises and breached

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their contract, their interest in it and right to it ceased, and they should have paid it over to complainants.

We hold, therefore, that the complainants are entitled to recover this insurance money, less the premium of \$225, and the \$168.75, loss on grist-mill, with interest from the date they personally refused to apply it to replacing the property destroyed. It appears from the proof that defendants cultivated 257 $\frac{1}{8}$ acres in 1878, and 277 $\frac{3}{8}$ acres in 1879. They should be charged with \$4 per acre for 277 $\frac{3}{8}$ acres for 1879, 1880, 1881 and 1882, less \$60 a year, the value, as it appears, of the land used, belonging to the Perry place, with interest on the yearly rental thus found to be due from the 15th of November of the year for which it accrued to the present time. The defendants are not liable for any part of the sum paid for having the cultivated lands embraced in the lease surveyed. The compensation of the receiver appointed in this cause will be paid out of the rents received by him, and the defendants will be credited with the rents, less his compensation. They should be credited with all payments made to A. J. Hayes, his wife, or either of their children, as shown by the proof, on account of their lease. They should be credited by the \$50 paid Carson for defending the Perry place; and, also, the \$200 paid attorneys for prosecuting the suit in Arkansas, and the costs of that paid by them. These credits will be applied to the rental due at the time they were paid.

The clerk of this court will cast up the items of account as herein indicated, and report the same to

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the court. The exceptions of defendants to the report will be overruled, and a decree will be entered here for the amount ascertained to be due by the report of the clerk herein ordered. The defendants will pay the costs of this court and the court below.

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J. A. ANDERSON, Administrator of Wm. Fellows, v. S.
E. NORTON *et al.*

AND

J. A. ANDERSON, Administrator of Charles and Freda
Winter, v. D. R. COOK *et al.*

1. PARTNERSHIP. *Partnership debts. Evidence. Admissions of partner.* A note executed by one member of a firm for money borrowed upon the credit and for the benefit of the partnership, is a partnership debt, and a writing by the other partner that the money was so used, and the debt was a partnership debt, is competent evidence in a suit between creditors of the partnership.
2. SAME. *Surviving partner. No power to give preference.* A surviving partner has no power by deed of trust on partnership property, to give one creditor preference over another.
3. SAME. *Mortgage to secure individual debts. Priority.* A mortgage executed by the members of a firm, upon the real estate of the firm to secure an individual debt of a partner, free from fraud or collusion, creates a prior lien to partnership debts.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

Anderson v. Norton.

C. F. VANCE for complainant.

GANTT & PATTERSON, HUMES & POSTON, J. J. JOHNSON, SMITH & COLLIER, ESTES & ELLETT, E. L. BELCHER, W. M. RANDOLPH and R. D. JORDAN for defendants.

WILSON, Sp. J., delivered the opinion of the court.

The record containing these various causes is very voluminous. With the questions of fact settled, but few questions of law are presented. We will state them as briefly as possible.

In 1857 or 1858, D. R. Cook and S. A. Norton engaged as partners in the grocery business in the city of Memphis, Tennessee, under the firm name of Cook & Co. Upon the approach of the Federal forces to that city in June, 1862, Cook moved to the State of Georgia, within the territory held by the Confederate armies, where he has since lived, leaving Norton in Memphis to wind up the business of the firm.

Cook became a partner of one Cheek in business in Georgia. He also, in the fall of 1872, while still a resident of Georgia, engaged with S. A. Norton in business in Memphis, under the firm name of Cook & Norton. Norton died in 1873, and by his death the latter firm was dissolved. Neither the firm of Cook & Co., Cook & Norton, nor the individual members, at the date of the institution of these various suits, owned any personal property, but as firms and individually possessed certain real estate

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which was heavily incumbered. As this litigation involves, in addition to contests over the validity of certain debts as existing debts against the firms or the individual members, the settlement of questions under these incumbrances, it is proper to state them, their date and by whom executed.

On February 1, 1872, Cook & Norton executed a deed of trust to E. L. Belcher to certain of the real estate belonging to the firm of Cook & Co. to secure a debt to one Winter, amounting to about \$9,000, evidenced by three notes signed by D. R. Cook as principal, and S. A. Norton and said Belcher as sureties. In April, 1875, Cook, as surviving partner of Cook & Co., conveyed certain of the real estate of the firm to W. M. Smith in trust to secure the payment of a large debt due from it to the Bank of West Tennessee.

Cook, on April 8, 1867, by deed conveyed to S. A. Norton an undivided half interest in two lots in Memphis, known in the record as the Clay block and the Jefferson street property. This deed of Cook to Norton recites, in substance, that while the title to the property conveyed is in the former, it is nevertheless the property of the firm of Cook & Co., having been bought and improved with its funds and for its benefit. It also recites that Norton is to take the undivided half interest conveyed to him subject equally with the half remaining in the conveyer, to liens for unpaid purchase money, to mortgages and deeds of trust executed on the property to secure the firm debts of Cook & Co, and to the

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outstanding debts of said firm not secured by mortgage or deeds of trust. It is proper, in this connection, to note the fact that this deed was signed by both Cook and Norton.

In August, 1866, D. R. Cook and S. A. Norton leased from William Fellows a lot on Second street, in Memphis, for the term of eleven years. The lease was signed "S. A. Norton, and D. R. Cook by S. A. Norton attorney in fact," and the notes given therefor were signed "Cook & Norton." Some of the notes given for this lease being unpaid at the death of Fellows came into the hands of Anderson, his administrator, and they constitute his demand in this controversy.

S. A. Norton, on the 5th of December, 1872, and on the 5th of January, 1873, borrowed \$10,000 from Mrs. Caldwell, giving his two promissory notes for \$5,000 each, bearing ten per cent. interest, payable quarterly. To secure them he executed to her a mortgage on a part of the real estate conveyed to him by D. R. Cook, by the deed of the 8th of April, 1867, before recited. The mortgage and the notes due her constitute her demand in this litigation.

The firms of Cook & Co. and Cook & Norton, and the members were largely indebted to other parties. With the individual and firm affairs thus situated, D. R. Cook, on the 13th of July, 1875, as surviving partner of the firms, filed his bill in the chancery court at Memphis, against Mrs. S. A. Norton, the widow and administratrix of S. E. Norton, his heirs, and the firm creditors, to wind up the business of said firms and to pay debts.

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Soon thereafter, in rapid succession, various creditors of the firms, and of the individual members, filed bills for the same purpose, or to enforce collection of their demands, and several parties, upon application by petition, were allowed to become parties, to establish their debts, to contest for priority, and the demands of others for satisfaction out of certain property upon which they claimed prior liens. Anderson, administrator, in one of his bills, attaches the property of Cook, and attacks the conveyance of Cook as surviving member of the firm of Cook & Co., made to secure the debt due from the firm to the Bank of West Tennessee. He also, in his bill, suggests the insolvency of the firms and the individual members, and seeks to have their estates settled as insolvent estates.

Mrs. Bradley, likewise, in her cross-bill, seeks to set aside the conveyance of Cook to secure the Bank of West Tennessee.

Being thus encompassed with debt and litigation, Cook, as a member of the firms of Cook & Co., Cook & Norton and Cook & Cheek and individually, in March, 1876, filed his petition for a discharge in bankruptcy in the Federal District Court for the Northern District of Georgia, and was, by that court, in December, 1876, regularly adjudged a bankrupt. His assignees in bankruptcy are made parties. They claim the assets of Cook and rely upon his application in the bankrupt court to defeat the lien of attachments levied within four months preceding the filing of his petition, and Cook pleads his discharge in bar of any personal decree against him.

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The attacks of Anderson, administrator, and of Mrs. Bradley, upon the conveyance made by Cook as surviving partner, to secure the Bank of West Tennessee, were predicated upon allegations that he had no power, as surviving partner, to give the bank a preference. A demurrer to this part of this bill was sustained by the special chancellor before whom the question was tried.

A large volume of evidence was introduced, and on the 14th of January, 1880, the various causes being consolidated, were referred to a special commissioner. He was directed to report the debts outstanding against the firm of Cook & Co., their date and origin, how evidenced and secured, and their respective priorities; the existing indebtedness of the firm of Cook & Norton, and of the individual members, how evidenced and secured, and their respective preferences, if any; and, also, the assets, real and personal, of said firm, and of the individual members, how incumbered and where situate.

The special commissioner filed his original report on the 19th of April, 1880, and a supplemental report on the 18th of May, thereafter. In his original report he sets out the property of the firms and of the members, and in both reports taken together, their debts, to whom payable, where located, how and when secured, if secured at all, and their respective amounts, with interest calculated to a common date. By them, the liabilities of Cook & Co. were shown to amount to \$68,955.41; and all the debts aggregating this sum were reported as standing on an equal footing, with

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respect to satisfaction out of the firm property except the debt of the Bank of West Tennessee of \$5,539.50, secured by the deed of trust executed by D. R. Cook, surviving partner, as hereinbefore stated. He reported, in his original report, the liabilities of the estate of S. A. Norton to be \$16,033.62, specifying the several debts constituting this sum; the debts of D. R. Cook at \$14,802.63; and those of Cook & Norton to be \$39,624.27. His amended report added some additional items of indebtedness against Cook & Norton, increasing somewhat the totals of their debts as above stated, but they are not further noticed here, as they are not specially involved in controversy.

Various exceptions were filed to the report of the special commissioner. We need not notice them in detail, nor minutely recite the action of the learned chancellor below on them. To do so would uselessly incumber this opinion, and make it necessarily of unwieldy and unwholesome length. It is sufficient to state, that with some modifications, he confirmed the report and rendered a decree for the sale of the property of the firms and of the individual, giving specific directions as to the application of the proceeds. From his decree, J. A. Anderson, administrator of Wm. Fellows, Mrs. M. W. Caldwell, Mrs. Jane Bradley, R. E. Crane and R. H. Richards, assignees in bankruptcy of D. R. Cook, Cook & Co., and Cook & Norton, Mrs. Belcher, J. A. Anderson, administrator of Charles Winter and Freda Winter, M. W. Clayton, W. W. and R. J. Young, prayed an appeal to this court.

All of these appellants perfected their appeals except

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Mrs. Belcher. The Referees, in a full and exhaustive report, have recommended an affirmance of the decree of the chancellor, except in two particulars. First: they report that the chancellor was in error in holding that the \$10,000 note of Mrs. Bradley, known in the record as the \$10,000 gold note, was a debt against Cook & Co., and say that it is the individual debt of S. A. Norton; and secondly, that he was in error in sustaining the demurrer of the Bank of West Tennessee, holding that the deed of Cook, surviving partner, giving the bank a preference was valid.

Solicitors of the assignees in bankruptcy, of Mrs. M. W. Caldwell, of Helen and Freda Winter, of the Bank of West Tennessee, and of J. A. Anderson, administrator of Wm. Fellows, have filed exceptions to the report of the Referees. Some of the parties have put in numerous and lengthy exceptions, covering the whole field of facts embraced in the record, and others raise questions of law upon certain facts claimed to be established in the record, or upon the facts as stated by the Referees.

It is useless to state and argue all the positions assumed by exceptants. The real gist of the controversy as presented by the parties may be resolved into three specified contentions:

First. All the exceptants vigorously object to the allowance of the debt of Mrs. Bradley, amounting at the date of the report of the special commissioner, to the sum of \$36,471.44 as a debt against the firm of Cook & Co.

Second. The trustee and representative of the Bank

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of West Tennessee contends that the Referees are in error in rejecting the trust deed executed by Cook, surviving partner, giving the bank a preference in the payment of its debt, invalid and inoperative, because its execution by Cook was without legal warrant and power.

Third. The administrator of Fellows is objecting because his claim is not reported as a claim against the firm of Cook & Co.

We will notice these contentions in their order as above stated. In order to do so it is necessary to briefly state the facts in connection with this claim of Mrs. Bradley. It is conceded to be based on a note of date February 1, 1873, for \$20,671.20, bearing ten per cent. interest, and due February 1, 1874, signed Cook & Co. The note was executed, and thus signed by S. A. Norton. It appears that Gen. Thos. H. Bradley, the husband of Mrs. Bradley, held two notes due in 1860 and 1861, respectively, for \$2,112.94 and \$1,520, against the firm of Cook & Co. By his will, of date February 18, 1864, he bequeathed these notes with other properties to his wife. There is proof tending to show that Mrs. Bradley loaned money to S. A. Norton, and that in 1866 she took his individual notes for it. But she testifies that all the money she loaned Norton was for the firm of Cook & Co., and for the benefit of said firm and on its credit.

We may assume it as proved in the record that in 1866 she did take two notes signed by Norton alone for over \$19,000. But in a subsequent settle-

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ment with Norton these notes were recognized as the notes of Cook & Co., and a note given for the same and the other indebtedness of the firm to her, both together amounting to \$23,630.13. This sum was reduced by payments, and on February 1, 1873, the note in controversy for \$20,671.20 was executed by Norton in the firm name.

Mrs. Bradley testifies that the money loaned Norton was for the firm of Cook & Co., and to pay off its debts. In support of her testimony there was introduced as evidence the following paper signed by Cook: "This is to certify that nineteen thousand eight hundred and eighteen dollars (\$19,818), borrowed by S. A. Norton of Mrs. Gen. Bradley was for the use of Cook & Co., and to be applied in payment of said Cook & Co.'s liabilities, and I am equally bound with S. A. Norton for its payment as one of the firm of Cook & Co., with S. A. Norton. Memphis, March 15, '66. D. R. Cook."

This paper was found among the papers of S. A. Norton after his death, and a few days before it was offered in evidence. It was proved to have been written and signed by Cook. It was objected to as incompetent evidence in the court below, and its inadmissibility is insisted on here.

The grounds of inadmissibility stated and relied on here are: First. It is the declaration of a third party not under oath, and living, but not called to testify. Second. It was not offered as evidence against Cook, but against Mrs. Caldwell contending for priority with Mrs. Bradley, Mrs. Caldwell not being in privity with

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Cook. And third. Because the declarations of Cook cannot establish the Bradley claim as a partnership debt of the old firm of Cook & Co., because the concurrent act of both partners could not create a firm debt after the dissolution of the partnership which could entitle such a creditor to share with the real firm creditors in the assets of the firm.

The partnership of Cook & Co. was dissolved in June, 1862, by the exigencies of the war, and the tacit agreement of the partners involved in the removal of one of the parties to another State, and their conduct in connection with their cessation of business. Mr. Norton was left in Memphis with power and authority to settle up the firm affairs. It is conceded that Norton, upon the dissolution of the firm, was not given any power, special or general, independent of his power and rights as a member of the firm, to bind it by new contracts. It is settled that without this power was conferred he had no such authority. It is also settled that where this power is given, a member of a dissolved partnership may bind the firm by new contracts. And so, where one partner of a dissolved firm, without special power, enters into a new contract in the firm name, the other partner or partners may ratify his action, and if it be ratified, in the absence of fraud or collusion, it will bind the firm and its property in the same way and to the same extent as if the partner had been given the power to make it upon the dissolution of the firm: *Hatton v. Stewart*, 2 Lea, 233; *McElroy v. McLean*, 7 Cold., 140; *Dunlap v. Limes*, 49 Iowa, 177.

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Norton borrows this money from Mrs. Bradley. He signs the firm name to the note given for the money. It is obvious that it is a firm note as to him, no fraud or collusion being alleged as shown. Mrs. Bradley testifies that she loaned the money to Norton for the use and benefit of the firm. And Cook, the other member of the firm, in order to show that the notes executed by Norton were firm notes given for the benefit of the firm, and to furnish Norton evidence of this fact against himself, and to approve of his action in borrowing the money in the firm name, prepares and delivers to Norton this paper offered in evidence.

It will not be seriously contended that in a contest made by Cook against Norton over these notes, this paper would be admissible evidence in favor of the latter to establish this firm character. If admissible for this purpose, in a contest between the partners, it is extremely difficult, if not impossible, to imagine a sound reason for its exclusion when presented as evidence in support of the notes and the authority for their execution by the owner of the notes suing for their recovery.

It is a misconception to argue that its admission violates the rule, administered with different qualifications by different courts, that the admission of one partner as to the existence of a debt against the firm made subsequently to the dissolution of the partnership, is not binding on the partnership or on the other partners. We do not dispute this rule, or its soundness, in its proper application. It has no rele-

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vancy here. Norton is not complaining. Cook is not. If Norton had written it and delivered it to Mrs. Bradley, Cook might in a proper case be heard to object. If Cook had written it and delivered it to her, Norton or his estate, in a proper case, might object. But when the members of a dissolved firm all say, by their admissions or declarations, that a note executed in their firm name is a firm note, and that it was given for money borrowed for firm purposes, we are unable, in the absence of an allegation and proof of fraud or collusion, to understand, much less sanction, a principle of evidence that excludes them.

Equally without legal merit is the objection that this evidence was offered, not against Cook, but against Mrs. Caldwell, who was contending for priority with Mrs. Bradley. It was offered, as an admission, tending to show that the debt of Mrs. Bradley was a valid debt against the firm of Cook & Co. in a proceeding by Mrs. Bradley to establish and collect it as a debt due from the firm. The fact that Mrs. Caldwell is a creditor of Norton, a member of the firm, holding a mortgage upon the undivided interest of her debtor in real assets belonging to the firm, and is, therefore, in respect to her debt not in privity with Cook, the other member of the firm, cannot deprive Mrs. Bradley of the evidence of a written admission and acknowledgment of Cook, given to Norton, and accepted by him for his protection, tending to show the character of her debt and its validity. To so hold would have neither the sanction of common sense nor authority. It is competent simply because

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it is the admission of a party of record against his interest, and being of this character a reasonable presumption of its truth is attached to it: Phelps on Ev., 1 vol., 402; Greenl. Ev., vol 1, sec. 169. An admission, whether it relate to the contents of a written agreement or any thing else, is evidence against the party making it in a suit involving the subject-matter of the admission: *Ibid*, vol. 1, 422.

It has been repeatedly held "that the admissions of a bankrupt before his bankruptcy are competent to establish a debt against him." So, also, in contests over the property of the fraudulent debtor, the admissions of the debtor prior to the conveyance are competent evidence to establish the indebtedness secured by it: Bump. Fraud Con., (2d ed.), 556 and notes. But it is said that Cook, the author of this paper, was not called to testify about it.

There is nothing in this: "Admissions may be shown by writing under the hand of a party, or by a witness who heard them, or the party himself may be called, if competent": 1 Greenl. Ev., sec. 191.

It is further urged, that the admissions of Cook contained in this paper ought to be excluded, on the ground that he did not personally know the truth of what he admitted therein. This is not essential. If a party, upon evidence satisfactory to him as to the truth of a transaction, makes a statement in relation to it against his interest, his statement is competent evidence against him, although it may not be entitled to great weight: 1 Halstead Ev., p. 436; *Sparr v. Willman*, 26 Miss., 230.

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We hold, therefore, that the chancellor below and the Referees were correct in their conclusions as to this debt of Mrs. Bradley, embraced in the \$20,671.20 note of date February 1, 1873. The contention of the Bank of West Tennessee is that the deed of trust executed by Cook, surviving partner, to secure its debt, is valid, and gives it a preference over the general creditors of the firm of Cook & Co. Its debt is conceded to be a firm debt. It is evidenced by a judgment of this court. Norton was dead, and the firm insolvent; and the question is: can the surviving partner of an insolvent firm mortgage the real assets of the firm to one creditor, thereby giving him a preference over other creditors of the partnership?

"It seems to us," says Judge McKinney in the case of *Bancroft, Beaver & Co. et al. v. Snodgrass et al.*, 1 Cold., 430, *et seq.*, "that the doctrine which asserts such a power in the surviving partners is irreconcilable with the established rights, as declared by law, of the representatives of the deceased partner, as well as of the joint creditors of the firm, and consequently cannot be sound."

In the case of *Watkins, Ad'mr, v. Fokes*, 5 Heis., 185, *et seq.*, this court, Chief Justice Deaderick delivering the opinion, directly approve the case of *Bancroft v. Snodgrass*, above cited. The Chief Justice, after quoting or referring to this case, says: "It is furthermore declared in the case already cited in 1 Cold., that the joint creditors have an equity or quasi lien under and through which the specific lien of the

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partners entitles them to have the partnership effects ratably appropriated to the discharge of each and all of the joint debts in case of a dissolution by death or bankruptcy of one of the partners, citing Story on Part., sec. 361; 2 Story Eq., sec. 1252; and this is said to be the "well established equity of all the joint creditors in the case of the death or bankruptcy of one of the partners." "If," continues the Chief Justice, "it be the imperative duty of the personal representative to see to the application of the joint effects to the joint debts, and if, in case of the death or bankruptcy of one partner, the joint creditors have an equity or *quasi* lien entitling them to have the partnership effects ratably appropriated to the discharge of each and all of the joint debts, it is manifest that under the circumstances of this case no one of the creditors of the partnership is entitled to appropriate the partnership effects to his own debt to the exclusion of all other creditors." In that case, it is to be noted, that the chancellor, as in this case, gave certain creditors priority of satisfaction under an assignment. His action was reversed.

The authority of these cases has not been shaken or doubted in an opinion delivered in any subsequent case before this court. To hold valid the assignment to the bank in this case we must reverse these decisions and the settled law in Tennessee. These decisions are not in conflict with the weight of authority in England, and from the other States of the United States. On the contrary, they are abundantly supported. And while many forcible arguments, aided

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by a technical logic springing from other analogous powers, conceded to exist in a surviving partner in dealing with the effects of the partnership, can be presented in favor of reversing our rule on this subject, we can see no sound or sufficient reason, with respect to the harmony of our jurisprudence or the demands of public policy, to authorize us to change the forum rulings of this court.

The report of the Referees in recommending a reversal of the decree of the chancellor on this point is correct.

The claim of Anderson, administrator of Fellows, originated in a lease of Fellows, in July, 1866, of certain real property in Memphis to D. R. Cook and S. A. Norton individually, and not as a firm. The notes given for this lease are not signed "Cook & Co.," but by Cook & Norton. The face of the notes and the lease, the fact of the dissolution of the firm, and its leasing to do business over four years before their execution, and the further fact that it was no part of the business of the firm of Cook & Co. to lease property to improve and rent out, all join strongly against the contention that this Fellows claim is a liability of the firm of Cook & Co. The proof adduced, under all the circumstances in the record, to overturn these facts, is not sufficient, especially as Cook himself, in his deposition, says this lease was an "isolated venture" of Norton and himself, and had no connection with the firm of Cook & Co.

The allegations of the bill of Cook, surviving partner in this case, and his schedules and proceedings in

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bankruptcy are relied on as creating an estoppel upon Cook to dispute the firm character of this claim.

Admissions or declarations made *in juris* are often entitled to little weight, because made in ignorance of the facts. The doctrine of estoppel, however, applies with peculiar force to admissions or statements made under oath in the course of judicial proceedings. But they are not always conclusive, and if it be made satisfactorily to appear that such admissions or statements were inconsiderately made, or made without a full knowledge of the facts, the court will relieve the party from the consequences of them: *Hamilton v. Zimmerman*, 5 Sneed, 39, 41; *Seay v. Ferguson*, 1 Tenn. Ch., 293.

The explanation of Cook and E. T. Belcher as to these schedules and how they were prepared, is satisfactory.

The debts due to Helen and Freda Winter present a difficult question. They seem to be the individual indebtedness of D. R. Cook, with Norton and Belcher as personal sureties, with the further security of a mortgage to E. L. Belcher as trustee on the real estate of the firm of Cook & Co., signed by both Cook and Norton, and also a mortgage executed by D. R. Cook on his individual real estate. While these are the individual debts of D. R. Cook, yet as the two members who had composed the firm of Cook & Co. executed the mortgage upon partnership property, the question is, does the mortgage, being free from fraud and collusion, create a prior lien to partnership debts?

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The Referees find the facts as above, and the solicitor excepts to their finding as to the debt being the debt of Cook and not the debt of the firm of Cook & Co., but does not except to their statement of the law that the partnership assets are not liable for its payment, or that the mortgage executed by both partners does not create a prior lien.

We have been furnished with no authorities on the point raised by the query or the facts, but upon sound reason we are opinion that the mortgage upon the partnership real estate signed by the members who had composed the firm does create a prior lien to partnership debts.

The report of the Referees is, as modified, confirmed, and the decree of the chancellor, as modified, is affirmed with costs.

Anderson v. VanBrocklin.

B. P. ANDERSON, Commissioner, v. E. VANBROCK-
LIN *et al.*

1. TAXES. *Land of United States.* Land to which the United States acquire title under a direct tax sale is not exempt from State taxation while so held.
2. SAME. *Same.* The act of the Legislature of March 31, 1885, which provides that all property held or owned by the United States under direct tax sales shall be exempt from taxation while so held or owned, does not apply to taxes then in course of collection by suit, and is probably unconstitutional, except as a statute of limitations.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

LEE THORNTON and MYERS & SNEED for com-
plainant.

GEORGE GILHAM and TAYLOR & CARROLL for
defendants.

COOPER, J., delivered the opinion of the court.

Bill filed to collect State, county and municipal taxes on lot 21 Block 6, and lots 13 and 14 Block 13, of the Fort Pickering addition to Memphis, and to enforce the lien therefor given by law. The taxes claimed are for the years 1864 to 1877 or 1878. The chancellor granted the relief sought as to the first lot, and refused it as to the others. Both parties appealed.

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All of these lots, then owned by R. H. Glenn, were sold on June 16, 1864, for the failure to pay the direct taxes imposed on realty by the act of Congress of 1862, and were struck off to the United States, the usual certificate of sale being issued accordingly. The United States brought an action of ejectment in the Federal Court for these lots, to which Van Brocklin made himself a party, and recovered judgment in January, 1877. No writ of possession issued for the first lot, Van Brocklin being permitted, on June 2, 1877, to redeem in the name of R. H. Glenn, by the payment of \$2.75 in full of tax and cost. A writ of possession issued for the other lots, under which the United States were put in possession on March 29, 1877. The lots were afterwards, on May 2, 1878, sold under the act of Congress for the taxes, and bought by defendant, J. F. Stacy, a son-in-law of Van Brocklin, at the price of \$54. The proof is that R. H. Glenn, the original owner of all the lots in 1864, sold them to Van Brocklin prior to 1870, who took, and remained in possession of them. The first lot was within the fortifications occupied by the forces of the United States during the civil war, the other lots being just outside the line of the fort.

No point is made on the levy and assessment of the taxes claimed, but the argument on behalf of the defendants is that, by the sale of June 16, 1864, and the certificate issued thereon, the title to these lots became vested in the United States, and that the lots thereby became exempt from taxation, either by force

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of the laws of the State or of the United States. By the laws of this State, lands ceded to the United States by the State, and the buildings thereon, while used for the public service, were exempted from taxation: Code, sec. 542, sub-secs. 1; Section 71, act of 1867-8, ch. 28, brought into the Revised Code, sec. 73a, *et seq.* The lands in controversy not having been ceded by the State to the United States, no exemption from taxation can be successfully claimed under these laws. The act of 1875, chapter 98, sub section 2, exempts generally "all property belonging to the United States," which was no doubt intended to apply to the lands ceded to the United States. It could not extend further, for the Constitution of 1870, Article 2, section 28, expressly provides that "all property shall be taxed," with power in the Legislature to except only such property "as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational." Property bought by the United States at its own tax sale, and held merely to secure the tax, would not come within any of these exemptions. The fact that the United States have acquired the title to land in this State by purchase or otherwise would not exempt the property from State taxation. The State will retain the power to tax unless the right is ceded, or remitted by a legislative exemption within the constitutional power of the Legislature. The State cannot tax the agencies of the general government, but it may tax the realty

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on or in which the agency is conducted: *McCulloch v. Maryland*, 4 Wheat., 431. The lots in controversy were, therefore, not exempt from taxation by any law of the State or the United States, and were properly taxed for the years mentioned.

Glenn and Van Brocklin were in actual possession of all the lots until the execution of the writ of possession on March 29, 1877, as to two of them. By the redemption of lot 21 Block 6, without that possession ever having been interfered with, they were remitted to all their original rights, precisely as if no tax sale had ever been made, no new title being acquired: *Cooley on Taxation*, 351. And all of the lots were subject to the lien for taxes given by statute, which may be enforced against the land into whosoever hands it may come.

The act of March 31, 1885, which provides that all property held or owned by the United States under direct tax sales shall be exempt from taxation while so held or owned, does not apply to this case because of the proviso which exempts from its operation cases where collections were "prevented or stayed by judicial proceedings," until one year after the determination of such proceedings. The act, except as a statute of limitations, is probably unconstitutional, inasmuch as it undertakes to create exemptions not allowed by the Constitution, and to interfere with rights already in suit. No point is made upon the occupancy of one of the lots by the military forces of the United States during the war, and could not be: *Rutledge v. Fogg*, 3 Cold., 554.

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The chancellor's decree will be modified so as to declare the right of the complainants to the taxes claimed on all the lots, and order a reference to ascertain the amount due, unless the parties agree upon the amount. The defendant, Van Brocklin, will pay the costs of the cause.

MEMPHIS WATER COMPANY *et al.* v. MAGENS & CO.

1. **CORPORATIONS.** *Sale of franchises under a mortgage.* The purchasers of the property and franchises of a corporation at a foreclosure sale, under a mortgage authorized by the charter, who, with a view of perfecting a reorganization of the corporation under the charter, meet together, elect officers and directors in conformity with the charter, and proceed to exercise the franchises of the corporation, under the name of the original company, for the purposes specified in the charter, do not thereby become the corporation, or make themselves or their property liable for the debts of the old corporation.
2. **SAME.** *Old and new. Liabilities.* A mere change of the name of an existing corporation, either simply or by way of consolidation with another company, would not affect the liabilities of the corporation, but the creation of a new corporation by the purchasers of the property and franchises of the old corporation, or the voluntary association of such purchasers under the name of the old corporation, would not render the new entity liable for the debts of the old.
3. **SAME.** *Same. Same.* A provision of a charter of incorporation that the purchasers of the property and franchises of the corporation, under a foreclosure of a mortgage thereof, shall be vested with all the powers and privileges, and be subject to all the duties and liabilities of said company, merely subjects the purchasers to the burdens and obligations of the charter, and not to the debts of the old corporation.

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4. **BOND, DELIVERY.** *Not a judgment.* A delivery bond, although it operates as a judgment by statute so far as to authorize the issuance of an execution thereon, is not a judgment.
5. **SAME.** *Estoppel.* A delivery bond which does not recite that the chattels levied upon were the property of the judgment debtor, or were levied upon as his property, will not estop one or more of the obligors from claiming the ownership of the chattels, especially if resorted to merely as a means of taking the property out of the hands of the sheriff with a view to settle the rights of the parties by an agreed case.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

GANTT & PATTERSON and WRIGHT & FOLKES for
complainants.

TAYLOR & CARROLL for defendants.

COOPER, J., delivered the opinion of the court.

Injunction bill tried upon an agreed statement of facts. The chancellor, on final hearing, made the injunction perpetual. The Referees recommend a reversal of the decree. The exceptions open the case.

By an act of the General Assembly of the State, passed on February 28, 1870, the Memphis Water Company was incorporated to construct waterworks in and adjacent to the city of Memphis, and to supply the city and its inhabitants with water. The act of incorporation conferred upon the company various privileges, and subjected it to certain obligations and burdens. The corporation was authorized to bor-

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row money for the purpose of carrying out its objects, and to issue bonds therefor. The ninth section of the act is in these words: "To secure payment of bonds issued, or moneys borrowed, the president and directors may mortgage all the property of the company existing at the date of the mortgage, as well as all the property by the company to be afterwards acquired, and the franchises granted by this act; and in case of foreclosure and sale under such mortgage, the purchaser or purchasers shall succeed to, and be vested with, all the powers and privileges, and be subject to all the duties and liabilities of said company." The corporation did borrow money, issue bonds therefor, and convey its property and franchises in mortgage, with power of sale, to secure the debt thus created. The mortgage was afterwards foreclosed by a sale of the property and franchises under a decree of the Circuit Court of the United States at Memphis, which sale was confirmed on March 5, 1880. Subsequently, when the purchase money had been paid, on June 17, 1880, the title to the property, "franchises, rights and privileges" of the company were, by a decree of that court, vested in T. J. Latham and four other persons named, as the purchasers, "free from all liability for the debts, contracts and responsibilities of the said Memphis Water Company." On March 9, 1880, the said purchasers met, and agreed to appropriate to themselves and such other persons as they might thereafter associate with them, "the rights, privileges and franchises granted in the charter of the Water company, together with all the property, real

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and personal, belonging to said company, and sold at said sale," and to assume the duties thereby devolved upon them. At the same time, "with a view of perfecting a reorganization of said company under said charter," they proceeded to elect directors and officers in conformity with the charter. The company, thus organized, thereafter exercised the franchises of the original corporation for the purposes specified in the charter, and under the name of the Memphis Water Company.

Previous to the foreclosure, but after the execution of the mortgage as aforesaid, the defendants Magens & Co., had recovered a judgment for several thousand dollars against the original Memphis Water Company, upon which execution had been issued and returned *nulla bona*. On September 2, 1881, an *alias* execution was issued on this judgment, and levied by the sheriff on certain personal property of the new Memphis Water Company, which had been bought since the purchase at the foreclosure sale, and the reorganization as aforesaid. On the same day, a delivery bond was executed by the Memphis Water Company, as principal, and the purchasers at the foreclosure sale as sureties, reciting the levy on the property, but without stating that the articles levied upon were the property of the Memphis Water Company, or that they were levied upon as the property of the company, and conditioned for the forthcoming of the property on September 13, 1881. The property was not then delivered, and the bond was declared by the sheriff to be forfeited. On the next day, this case was submitted to the chancery court upon an agreed statement of facts.

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This statement, after setting out in detail, with exhibits, the foregoing facts, showed further that the purchasers at the foreclosure sale had increased the capital stock of said company, and divided it into shares, many of which were held by new parties. "It is agreed," says the statement, "that this case be filed in the chancery court of Shelby county, and that it stand as an injunction bill; that the sheriff return the execution and forfeited delivery bond aforesaid to the circuit court as enjoined in his hands." There are also these further stipulations: "This case is to stand as though the Memphis Water Company and the sureties (naming them) on the delivery bond executed to the sheriff for the property levied on, had filed their bill on the facts herein agreed, and obtained an injunction to restrain said Magens & Co. and said sheriff from further proceeding on said execution and delivery bond; and a bond made by said Water Company and sureties is filed as part of this agreed case, and to be taken as an injunction bond duly given under the *fiat* of the chancellor in such a proceeding, upon which, as upon an injunction bond, judgment may be entered in this agreed case on the contingency of an adjudication in favor of said Magens & Co. in this case, as is provided in the condition of said bond." That bond recites that "an agreed case has been made up between the said Magens & Co. and the said obligors herein, to be tried in the chancery court of Shelby county, to test the question of the liability of the Memphis Water Company for the debt of said Magens & Co. aforesaid, under the

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present organization of the Memphis Water Company.

* * Now, therefore, if, as the result of such agreed case, it shall be adjudged that the Memphis Water Company, as now organized, is liable for the debt of the said Magens & Co., or that its property, so levied on as aforesaid, is subject to the said execution, then, as part of the judgment in said case, judgment may be rendered upon this bond against the obligors" for the judgment, interest and costs. The agreed case contains this further clause: "The complainant company denies liability, and says the levy upon its property is wrongful; and the claim for satisfaction by the defendant, and the denial of the right thereto by complainant, make the issue for trial on this agreed case."

The question then is whether a judgment-creditor of the original Memphis Water Company can subject to the satisfaction of his debt the property of the new company "as now organized." What is the organization of the new company? The original charter of the old company authorized it to mortgage its property and franchises, and consequently the mortgage itself and the sale thereunder conveyed the property and franchises. This court has held, in accord with the uniform current of authority, that the franchises thus conveyed would only be such as appertain to the use of the property for the purposes of the grant, and that they do not include the power to form a corporation, either by a reorganization of the old entity or *de novo*: *Ragan v. Aiken*, 9 Lea, 609; *Railroad v. Kyle*, 9 Lea, 691. The power to create a corpo-

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ration is a branch of sovereignty, and cannot be assigned without legislative sanction. The organization or reorganization of the purchasers of the property and franchises in this case did not, therefore, revive the old corporation or create a new corporation. The parties themselves may have thought, and it seems did think, otherwise, and proceeded in their action upon the idea that they had acquired, by their purchase, the right to be the corporation created by the original charter. In this conclusion they were simply mistaken: *Memphis, etc., Railroad Company v. Commissioners*, 112 U. S., 610. They became authorized by their purchase to exercise the franchises bought, as a partnership, association, or joint stock company, and they might do this under the name of the old company, or any other name they saw proper to assume, and under the forms of the old organization, or any other form they might deem advisable to adopt. But they did not thereby, and could not, become a corporation, and would not be liable as such to any person except one subsequently dealing with them in their new capacity.

Of course, a mere change of name in an existing corporation, either simply or by way of consolidation with other companies, would not affect the liabilities of a corporation: *Miller v. Railroad Company*, 5 Cold., 514. But the creation of a new corporation under legislative authority, or voluntarily, if that were possible, would not render it liable for the pre-existing debts of another corporation of the same name. Nor, *a fortiori*, would a voluntary organization of a part-

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nership or association of persons under the name of a pre-existing corporation, render the new entity liable for the debts of the old.

These principles are frankly conceded by the learned counsel of the defendants, and they admit that the complainants have not, by any thing they have done in the organization of their association, made themselves liable for the debts of the original Memphis Water Company. Nor do they insist, as suggested by the other side, that the purchasers under the foreclosure sale became liable, under the ninth section of the original charter, for the debts of the old corporation. That section, as we have seen, provides that the purchasers under the foreclosure sale shall be "vested with all the powers and privileges, and be subject to all the duties and liabilities of said company." The plain meaning of this provision is that while, under the sale of the property and franchises of the corporation, the purchasers are clothed with the powers and privileges of the charter for the purposes specified therein, they must equally be subject to the duties and liabilities, or burdens and obligations, imposed by the charter. And it would be simply absurd to hold that under a provision of a charter intended to secure specific debts, those debts would not only not be secured, but outside debts would be. That would be a practical illustration of the query, does prohibition prohibit? in the form of does security secure? The real contention of the defendants is that the complainants might, by proper action in time, have prevented their property from being subjected to

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the debts of the old corporation, but that as to the particular debt in controversy, they have become liable therefor by the course pursued, and, under the facts of the agreed case, must be made to pay the same.

It is first contended that the delivery bond by its forfeiture became a judgment, binding on all the parties. But a judgment is a decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record, or the conclusion of law upon the facts found by the court or jury, or admitted by the parties: Freem. on Judg., sec. 2. A delivery bond, although it operates as a judgment by statute so as to sustain an execution, is not a judgment, and so this court has held in *Haynes v. Jordan*, 2 Leg. Rep., 282.

It is next insisted that the execution of the delivery bond estops the complainants to deny that the articles levied on were the property of the old corporation. But the bond, as we have seen, does not recite that the articles were the property, or were levied on as the property, of the old company. There is consequently no technical estoppel by positive averment, and our authorities are uniform that the mere joining in the bond will not prevent a person from claiming the property: *Decherd v. Blanton*, 3 Sneed, 373; *Helm v. Wright*, 2 Hum., 75. The bond seems to have been resorted to merely as a means of taking the property out of the hands of the sheriff in view of the contemplated adjustment of the rights of the parties in the agreed case.

And this agreed case, in the plainest terms, ex-

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pressly provides that it is to be treated as upon a bill filed by the complainants to enjoin a sale of the property, and that the liability of the complainants is to depend upon its being adjudged, on the agreed facts, that the Memphis Water Company, as now organized, is liable for the debt of the defendants on the old company, and its property subject to the execution levied thereon. We are clearly of opinion that the new association, "as now organized," is not liable for the debts of the corporation, nor its property subject to execution on such debts.

The exceptions to the report of the Referees will be sustained, and the chancellor's decree affirmed with costs. A similar decree will be entered in the case of the Memphis Water Company and others against J. O. Pierce, defendant, on the same state of facts.

THE STATE v. G. T. O'Haver.

WITNESS FEES. *Criminal cases.* A witness cannot prove attendance at any one term of the court in more than two criminal cases, although the terms of the court may have greatly lengthened since the passage of the statute prescribing the restriction, and the cases have been tried at different times during the term.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. A. H. DOUGLASS, J.

The State v. O'Haver.

ATTORNEY-GENERAL LEA for the State.

G. B. PETERS for O'Haver.

COOPER, J., delivered the opinion of the court.

The defendant in error applied to the clerk of the criminal court of Shelby county to tax the sum of two dollars as his witness fees, under subpoena on the part of the State, in the case of the State against Willis Cole, tried at that term of the criminal court, and in which he was examined as a witness. The clerk refused to tax the fees because O'Haver had already, at that term of the court, claimed fees as a witness, which were allowed and taxed, in two other criminal cases. The plaintiff in error then moved the court to order the clerk to tax the fees, and, on the hearing of the motion, proved that the two other cases, in which his witness fees were taxed, were tried on separate days from each other, and from the day on which the case in question was tried, and that in neither of said cases was he in attendance on the same day, and that the cases had no connection with each other. The criminal judge sustained the motion, and ordered the fees to be taxed, and the State appealed.

The new Code, section 6235, is: "No witness can prove attendance at any one term of the court in more than two criminal cases." Costs are created by statute, and unless there be some law to authorize it, the court can not give costs against any one: *Moon-eyes v. State*, 2 Yer., 578; *State v. Barton*, 3 Hum., 13; *State v. Wormick*, 1 Lea, 559. And before the

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statute which allowed a witness to prove his attendance in every suit in which he was summoned to testify, this court held that a witness summoned in more than one case could only be allowed his attendance in one: *Hopkins v. Waterhouse*, 2 Yer., 323. The duty of the court in the matter of costs is simply to obey the statute law.

The argument submitted in support of the ruling of the court below is based partly on the fact that section 6235 is taken from the act of 1843, since which time the "term" of the court has been greatly lengthened, and partly on the hardship of the restriction on the witness, whose services may be thus taken without just compensation. But these are reasons to be addressed to the Legislature, not to the courts. The directions of the law-making power must be obeyed until that power sees proper to alter them. And the refusal of the courts to tax an item not warranted by statute in the bill of costs does not interfere with the party's right to just compensation, if he be entitled to compensation beyond the taxable costs.

Reverse the judgment.

Keith v. Fitzhugh.

JOHN Y. KEITH *et al.* v. EDMUND FITZHUGH *et al.*

ATTORNEY'S FEES. *Suit for partition.* The lawyer who files a bill for partition, under which the property is sold, is not entitled to a fee out of the whole fund realized, but only out of his client's share.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

C. A. & A. MILLER and FINLAY & PETERS for
complainants.

HILL & WILKERSON, E. B. MCHENRY and ESTES
& WARINNER for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed, and successfully prosecuted, to sell a lot in Memphis for partition, the lot selling for \$4,150. There were six interests represented in the case as follows: One-sixth by the complainants; one-sixth by adult non-residents of the State, who were not represented by counsel; one-sixth by an adult resident, who answered by counsel, consenting to the sale; two-sixths by infants who appeared by a guardian *ad litem*; and one-sixth in part by infants represented by a guardian *ad litem*, and in part by the life tenant, and certain adult owners of the remainder interest in this one-sixth, who, by counsel, resisted the sale. After the sale of the lot had been confirmed, the counsel of the

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complainants moved the court for a reference to the master to take proof and report what would be a reasonable fee to be paid them for their services, and to have a lien declared on the whole fund for the compensation thus ascertained. The chancellor refused to entertain the motion, and the counsel appealed.

A lawyer has a lien in this State upon the money or property, the subject-matter of litigation, which has been recovered for the client by the aid of the lawyer's professional services. There must be an actual recovery, not the mere preservation of an existing right: *Garner v. Garner*, 1 Lea, 29.

If the bill impounds or secures a fund, in peril or doubt, in which third persons may be entitled to share by coming in and making themselves parties to the suit, the counsel whose services in the general litigation have contributed to the result may be paid out of the aggregate recovery: *Moses v. Ocoee Bank*, 1 Lea, 398; *Whitsett v. City Building Association*, 3 Tenn. Ch., 526. The court merely declares the lien, where it already exists, as notice of the fact, leaving the counsel to enforce it by appropriate proceedings in the proper forum: *Perkins v. Perkins*, 9 Heis., 95.

The proceedings in this case, there being adult parties interested in contesting the claim, by mere motion are not warranted by law, and we can only dispose of the controversy, if at all, as upon an agreed case, no point having been made upon the mode adopted. A bill for partition of realty, even if the object be to sell the property for division, is not a suit to impound or secure a fund in which third per-

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sons, not parties, may come in and share. It is an ordinary suit *inter partes* to sever existing interests, not to recover property. There is no more reason for extending the lawyer's lien over the entire property or its proceeds in such a case, than in any other suit about property in which each party has a distinct interest, and the lawyer represents only his client. And we know of no authority or principle for taking the case out of the general rule. The lawyer's claim and lien are only on his client's interest or share.

Affirm the chancellor's decree with costs.

E. T. KING v. THE STATE.

1. **CRIMINAL LAW.** *New trial.* After a trial on the merits in a criminal case, upon the plea of not guilty, the defendant is not entitled to a new trial, or to a reversal of the judgment, for any causes enumerated in section 6083 of the new Code, even if two or more of them be found to exist, and the cases of *State v. Davidson*, 2 Cold., 184, and *Thurston v. State*, 3 Cold., 115, holding otherwise, are overruled.
2. **SAME.** *Evidence.* Proof of the finding of postal cards, addressed to the defendant, at a place where the State sought to show that the defendant was about the time of the commission of the offense of arson, was properly admitted over the objection of the defendant, the court stating to the jury at the time, and again in his charge, that the proof would amount to nothing unless they should find that the defendant had possession of them beforehand, and left them at the place.
3. **SAME.** *Charge of court.* The trial court cannot be put in error for failing to explain to the jury the law as to the fabrication of evidence, when no request was preferred to him to make such a charge,

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and when it does not appear that any such point was made in the court below, unless, indeed, the court could see that the defendant was seriously prejudiced by the omission.

4. *SAME. Preponderance of evidence.* After verdict, and the refusal of the trial judge to set it aside, this court will not reverse on the facts unless the evidence preponderates against the verdict.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
T. J. CARTHEL, J.

L. W. JONES and J. R. DEASON for King.

W. W. WADE, T. E. HARWOOD and ATTORNEY-
GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

Appeal in error from a judgment of conviction for arson.

The first ground for reversal is that the record is defective. It fails to show that the clerk or sheriff was present at the term of the court when the indictment was found, or at the term the prisoner was tried. It does not contain a *venire facias* at the term at which the indictment was found. It fails to show that the indictment was returned into court by the grand jury, etc. The learned counsel of the prisoner admits that the Code, sec. 5242, New Code, sec. 6083, provides that after a trial and a conviction on the merits, the prisoner "shall not be entitled to a new trial, or to a reversal of the judgment, for any of the following causes," enumerating, among others, the omissions and defects now assigned as error. The counsel concedes

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that the statute cures any one of these defects if it stood alone, but he insists that when two or more of these defects occur together in the same record, they are fatal, citing, in support of his position, *State v. Davidson*, 2 Cold., 184, and *Thurston v. State*, 3 Cold., 115. And it is true that in these cases our predecessors upon this bench came to the conclusion that the statute should be construed as if it read "for any *one* of the following causes," interpolating the word "one" into the clause. For many years their successors have been unable to see the propriety of the interpolation, and have in numerous unreported cases overruled these decisions. The object of the Legislature was clearly, after a fair trial on the merits, to put an end to the delays of justice, and the escape of the convicted criminal by reason of clerical omissions and technical defects in the record. It was therefore provided by the section under consideration that the convict should not be entitled to a new trial, or to a reversal of the judgment, for any of the enumerated defects. If no one of them would be fatal to the proceedings, it is difficult to see how any number of them could be, for it would be merely the addition of ciphers, which, as our first lesson in mathematics tells us, would result in a cipher. The legislative intention clearly was that none of them, singly or in files, should stand in the way of the enforcement of the law, after the defendant had chosen to plead not guilty, and go to trial on the merits. If he desires to make a point upon such defects he must do it in advance.

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It is next insisted that the court erred in admitting incompetent testimony over the objection of the defendant, and in his charge to the jury in relation to the particular testimony. The crime for which the prisoner was indicted was the burning of the prosecutor's dwelling-house during the night of the first Saturday in February, 1884. On the next morning a place was found in the woods in front of the house where a horse had been fastened, and one link in the chain of evidence tending to fix the act of the burning on the prisoner was the tracing of the tracks of that horse in the direction of the house where he was then staying. Two witnesses depose to the finding, on the morning after the fire, about where the horse stood, two postal cards addressed to the defendant, on each of which was a written communication dated in January, 1884. The defendant objected to the testimony, because there was no proof showing that the postal cards were ever in defendant's possession. The testimony was admitted, the bill of exceptions says, with "the qualification as given by the court and in his charge." The defendant afterwards introduced evidence tending to prove that the cards had been found by one of the State's witnesses before the burning, in a book which the defendant had left at a house where he had been boarding. The trial judge charged the jury upon this subject as follows: "As to the postal cards, as I said to you at the time they were read on the trial, they amount to nothing as evidence unless you are satisfied that the prisoner had received, and had possession of them

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before the time it is claimed the house was burned. But if you find the prisoner did have possession of of said cards, and that said cards were found at the place where a horse was hitched in the woods near the premises of the prosecutor, then you should consider such evidence as circumstantial for what it is worth to show where the defendant was at that time. And, after all, such evidence amounts to nothing against the defendant unless you find from all the evidence that he had the cards, and left them there where the cards were found, and whether defendant or other parties left them there, and the effect of such evidence is for you." The testimony in relation to the cards objected to was clearly admissible, under the instructions of the judge given at the time, to go for what it was worth. Like the proof in regard to the fodder found scattered around the place where the horse stood, fodder having also been used in making the fire by which the house was burned, without first showing that the defendant had been in possession of the fodder, the testimony objected to was admissible, although worth nothing, to use his Honor's language, unless the defendant was in some way connected with the articles found. And the remarks and charge of the judge on the subject are free from all just exception.

It is next objected that the court should have explained to the jury the law as to the fabrication of evidence. But his Honor was not asked to make any such charge, and we cannot see that any point was made in the court below on this subject. One of the strongest links in the chain of evidence against

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the defendant was, that the tracks of a man were found, on the morning after the fire, going up to the prosecutor's house, and the tracks of a man, as if running, going down the path. These tracks corresponded in size with the defendant's foot, and exactly fitted an old shoe of the defendant, which he had left the previous fall at the prosecutor's house, where he had been boarding. These facts were proved by several witnesses, one of them being the justice of the peace who had bound the prisoner over for trial. One of the defendant's witnesses had also examined these tracks in part. He testified that the tracks down the hill were only heel tracks, there being no pressure of the front part of the foot at all. He adds: "When we put the shoe in the track, it made me think this was the same shoe. The heel tracks could have been made by a man pressing the old shoe down on the ground." This testimony, together with the witness' statement that he saw only one heel track on each side of the branch, although he looked for the other foot, might lay the foundation for a charge of fabrication of evidence by the prosecutor. It would not be worth much in the face of the testimony of the other witnesses, but the defendant's counsel might have made the most of it (as probably he did) in the court below, and might have had a charge upon it if he had asked for it. The trial judge can not be put in error upon such a matter unless it appear that his attention was called to it, or unless we can clearly see that the defendant was seriously prejudiced by the omission.

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The defendant's counsel thinks that the verdict is not sustained by the evidence. But the jury and the trial judge have thought otherwise. The burden is thus thrown upon the defendant to satisfy us that the verdict is erroneous, that is, that the evidence preponderates against the verdict. The benefit of a doubt must be obtained from the jury. A careful examination of the record satisfies us that the weight of evidence is with the verdict.

There is nothing in the so-called newly discovered evidence to authorize a new trial.

Judgment affirmed.

GILBERT MOYERS v. JOSEPH GRAHAM.

1. **CONTRACT.** *May be rescinded. When.* If a party to an executory contract on mutual promises become incapable, except by the act of God or the public enemy, of performing his part of the contract, the consideration of the promises of the other party necessarily fails, and he may rescind the contract, and the party failing to perform can recover nothing on the contract.
2. **POWER OF ATTORNEY.** *May be revoked. When. Damages.* A power of attorney, although in terms irrevocable, may be revoked, subject to liability in damages for a breach of any contract therein, but if the revocation be occasioned by the failure of the attorney to perform, there is no ground for damages.
3. **ATTORNEY.** *Effect of being disbarred.* Where an attorney employed to prosecute a claim before the Treasury Department of the United States, under a contract for compensation out of the recovery, with a lien thereon, is disbarred from practicing in the Department by an order of the Secretary of the Treasury, the client may rescind

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the contract, and revoke the power of attorney authorizing the agent to act, and the subsequent revocation of the order of disbarment will not revive the relation.

4. CONTRACT. *Quantum meruit*. To recover upon a *quantum meruit*, where the party suing has violated the contract, he must show the performance of services, and that those services were of benefit to the other party.
5. EVIDENCE. *Letter*. Neither an original letter, nor a certified copy thereof, from the Commissioner of Internal Revenue, in answer to certain inquiries, is evidence of the facts therein stated.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

GEORGE GILHAM for complainant.

TAYLOR & CARROLL for defendant.

COOPER, J., delivered the opinion of the court.

On August 1, 1882, the defendant, Graham, employed the complainant to prosecute a claim on the Treasury of the United States for the excess over the taxes of land sold in 1864 for the direct tax under the act of Congress of 1862, which excess had been paid into the Treasury. The defendant agreed in writing to allow the complainant a fee of one-half of the amount collected, and that the fee should be "a lien on any draft that may be issued in payment of said claim." He also gave the complainant a power of attorney, "irrevocable," to prosecute the claim. The complainant, under the employment, proceeded to file a petition, affidavits and certificates of

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title in support of the claim, as required by the rules and orders of the department. Prior to the contract of employment, on May 16, 1882, an information had been filed against the complainant in the Circuit Court of the United States for the Western District of Tennessee, where he resided, for wrongfully and illegally demanding and receiving a greater compensation than allowed by law for the prosecution of a pension claim. On February 19, 1883, the Secretary of the Treasury issued an order based upon a similar order of the Interior Department, directing that the complainant should not thereafter be recognized as an attorney in any claim or matter before the Treasury Department. On April 23, 1883, this order was rescinded, because, as recited on the face of the rescinding order, the Secretary of the Interior had so modified his disbarring order as to confine its action to the Pension Office for purposes of enquiry. In the meantime, on March 28, 1883, the defendant, Graham, by a power of attorney to his co-defendant, R. M. Thompson, revoked his previous power of attorney to the complainant, and appointed Thompson as his attorney to prosecute the claim, and stating that he had changed his attorney for the reason that the complainant was under indictment before the United States Circuit Court. The change of attorneys was recognized and sanctioned by the department, the claim being acted upon and passed under the proceedings instituted by Thompson as attorney, and the warrant for the amount found due was delivered to him. It does not appear that complainant had notice of the revocation of his

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power and the appointment of Thompson until shortly before the issuance of the warrant, and he had, after the rescission of the order of disbarment, filed some additional or amended evidence with the department. This suit was commenced August 1, 1883, to impound the warrant in the hands of Thompson upon the ground of the lien given thereon in the original agreement, and to recover the one-half of the amount collected, or, if this relief could not be had, to recover a *quantum meruit* for services. The chancellor, on final hearing, dismissed the bill, and the Referees report in favor of affirmance. The complainant excepts.

If a party to an executory contract upon mutual promises become incapable, except by the act of God or the public enemy, of performing his part of the contract, the consideration of the promises of the other party necessarily fails, and he has the right to rescind: Bishop on Con., sec. 674. In such a case the party failing to perform can recover nothing on the contract: *Id.*, sec. 681. A power of attorney, although in terms irrevocable, may nevertheless be revoked, subject to damages for the breach of any contract therein. And if the revocation grew out of the failure of the attorney to perform, there is no more ground for damages than in the case of a justifiable rescission: *Carver's case*, 7 Court of Claims, 499; *Dodge v. Schelt*, 14 Rep., 39. After a rescission or revocation there can be no resumption of the relation except by consent.

The consideration of the employment of the complainant by the defendant was the continuous performance of such services as were required in the pros-

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execution of the claim. The contract was one of mutual promises and executory. The complainant having become incapable of prosecuting the claim by reason of his disbarment, the consideration of the defendant's promises necessarily failed, and the defendant might lawfully rescind the contract and revoke the authority of the complainant. This was what was in effect done by him, while the complainant was thus disbarred. And after it was done, the relation between the parties could not, upon general principles, be resumed except by mutual consent. Moreover, the rules of the Treasury Department expressly provide that, after disbarment, the attorney, if the order of disbarment be revoked, can only resume his position in any case with the consent of the applicant. *Prima facie*, therefore, the complainant has no right of action on the contract.

It is argued on his behalf that he had no notice of the revocation until after the order of disbarment had been revoked, and after he had filed additional evidence in the case. The bill alleges that about the time the claim was ready for allowance, he, complainant, was notified by the department that the defendant had revoked his authority, and appointed another attorney. But it does not allege that complainant was not previously made aware of the fact. He must have known that his disbarment necessarily put an end to his power to perform the contract, and it was his duty, as practicing attorney before the department, to know that after the disbarment he could not, under the rules of the department, upon a revocation of the

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order, resume his position in any case without the consent of the applicant. He should, consequently, as soon as the order was revoked, have applied to the defendant, Graham, for his consent to the further prosecution of the suit, and if, without such consent, he chose to perform services in the matter, it was at the risk of their being subsequently ratified.

It is also said that the power of attorney to Thompson gives as the reason for the change that the complainant was under indictment in the Circuit Court of the United States, and not the fact that the complainant was then disbarred, and that he could not subsequently prosecute the case or be recognized by the department until he had obtained the defendant's consent to his renewal of the relation. If he had applied either to the defendant or the department, he would have learned the true state of facts, if, indeed, he was ignorant on the subject.

Strictly speaking, as we have seen, the complainant, having first violated the contract by becoming incapable of performing it, could recover nothing. And the only ground for equitable relief as compensation for services, would be to show that beneficial services were actually rendered. The bill assumes, rather than asserts, that the services performed were of benefit to the defendant, because the papers filed by the complainant were used in acting upon the claim. The defendants in their answer deny the charge, and say the claim was prosecuted, and all the proof taken and filed by Thompson. The proof of complainant tends to show that some papers were prepared

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and filed by him, but it also shows that the additional papers presented by him after the revocation of disbarment were to supply defects in those previously filed. And the complainant fails to prove that the papers prepared and filed by him were in fact used in adjudging the claim. There is in the transcript the certified copy of a letter to Thompson from the Commissioner of Internal Revenue, which states that the case was tried exclusively upon the papers furnished by Thompson, and the records of the office. This evidence was objected to, because it was merely a copy of a letter taken from the letter-book of the department, and should have been excluded. The act of Congress makes copies of any books, records, papers or documents in any of the executive departments, authenticated under the seal of the department, admissible in evidence "equally with the originals thereof." But the original letter, which merely undertook to answer certain inquiries, would not have been evidence of the facts therein stated, much less an office copy thereof: 1 Greenl. Ev., sec. 498. But we think the burden was upon the complainant to make out his case, and to prove that what he had done was of service to the defendant. And he should also have shown, what he has failed to do, what those services were worth.

The report of the Referees must be confirmed, and the decree below affirmed with costs.

A like decree will be severally entered in the cases of Gilbert Moyers against E. A. Benson and others, and Gilbert Moyers against G. M. Lewis and others.

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The three cases were heard together, and turn upon the same questions. The power of attorney to Thompson, revoking the previous power to the complainant, was, it is true, executed by Benson one day after the order disbarring the complainant had been revoked. But, as we have seen, the disbarment itself terminated the relation between Benson and complainant, and that relation could not be renewed except with Benson's consent. It is true also that the power of attorney by Lewis to Thompson was executed about two months before the order of disbarment of the complainant, but it does not appear that it was filed with the department, and actually used until after the disbarment.

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WILLIAM HAYES *v.* THE STATE.

CRIMINAL LAW. *Attempt to commit larceny.* Under section 5379, new Code, an indictment for attempt to commit a larceny is good, and the same particularity in the description of the property attempted to be stolen is not required as in an indictment for larceny.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. A. H. DOUGLASS, J.

S. D. WEAKLEY, JR., for Hayes.

ATTORNEY-GENERAL LEA for the State.

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WILSON, Sp. J., delivered the opinion of the court.

On April 24, 1885, the grand jury of Shelby county returned an indictment against William Hayes. It is charged therein, that he, "on the 20th day of April, 1885, in the county aforesaid, feloniously did attempt to steal, take and carry away from the person of Kennedy Jones, fifty dollars of good and lawful money of the United States, then and there being the property of the said Kennedy Jones, against the peace and dignity of the State." Upon his arraignment, the defendant moved to quash the indictment, and his motion was overruled. He was convicted by the jury and sentenced to the penitentiary of the State for one year. Failing in his motion for a new trial and in error of judgment, he has appealed to this court.

The errors relied on, are: First, that the verdict is not supported by the evidence. Second, for error on the part of the court in refusing to charge the jury as requested. Third, for refusing to quash the indictment and arresting the judgment. Without going into details as to the evidence, it is sufficient to say, that there is no preponderance against the verdict. The weight of evidence is in its favor. The error assigned to the charge of the trial judge, was his refusal to instruct the jury that the offense charged in the indictment was a misdemeanor only, and not a felony.

The section of the Code on which the indictment is founded (sec. 4630, M. & V., Revised), provides that: "If any person assault another with intent to

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commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, when the punishment is not otherwise prescribed, he shall, on conviction," etc. In *Jones v. State*, manuscript opinion, delivered at the December term, 1871, of this court, it was held that this section was intended to include only assaults upon the person, and not an attempt to commit a larceny.

This case was referred to approvingly by Judge Nicholson, in the civil case of *Marks v. Borum*, decided at the December term, 1873, and reported in 1 Baxt., 53. It was again referred to and accepted as a correct exposition of the statute, in the case of *The State v. Montgomery*, decided at this place at the April term, 1874, Judge Sneed delivering the opinion of the court. The case was also referred to in the case of *Nicholson v. State*, 9 Baxt., 258, decided at this place at the April term, 1878, Judge Freeman delivering the opinion. In this case, the party having been indicted for an attempt to commit a larceny, the court, referring to *State v. Jones*, says: "If we adhere to that holding, the party cannot be held liable under this section, nor be convicted of a felony."

In the case of *DeLacy v. State*, 8 Baxt., 401, decided by Judge McFarland, at Knoxville, at the September term, 1875, it was held that a conviction for an attempt to commit a larceny, under an indictment for larceny, was proper, and the prisoner in that case was sent to the penitentiary for three years.

The *DeLacy* case was referred to approvingly in the case of *Hall v. State*, decided at Knoxville, at the

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September term, 1881, reported in 7 Lea, 685, Justice Cooper delivering the opinion.

It would seem to be difficult, without indulging in needless refinements, to reconcile the principle of the *DeLacy* case with the holding in the case of *Jones v. State*, manuscript opinion, referred to. They cannot, on sound principle, stand together.

The reasoning and position of the court in the *DeLacy* case is more in consonance with a sound exposition of the statute, and the end intended to be subserved by the Legislature in its enactment. We, therefore, overrule the case of *Jones v. State* (manuscript opinion), and hold that the court was not in error in refusing to charge as requested by the prisoner—that he could only be convicted of a misdemeanor under the indictment.

The third and last objection of the prisoner is, that the court erred in not quashing the indictment upon his original motion, and in not arresting the judgment of the verdict, because of the insufficiency and uncertainty of its allegations and description of the property alleged as the subject of the attempted larceny.

The objection raises the point that the money, charged to have been the subject-matter of the attempted larceny, should have been described with the same particularity as would have been required in an indictment for its actual larceny. We do not think so. The felonious theft of specified property is the thing charged in the indictment for larceny, and necessary to constitute the offense. It is the attempt to commit a larceny, not *the* actual larceny of any particular goods

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or property, that constitutes the offense defined by the statute in review. And so it has been held in a "class of cases," also quite numerous in this country, viz: assaults, or attempts to commit offenses in themselves indictable, the same particularity is not necessary as is required in indictments for the commission of the offenses themselves: *State v. Montgomery*, 7 Baxt., 160; Wharton, sec. 292.

If the indictment on its face show facts which make "an attempt," in point of law, and so identifies the offense as to secure the offender from a second prosecution for it, it is sufficient: 7 Baxt., cited; *People v. Bush*, 4 Hill N. Y. Rep., 132; Whart. Am. Crim. Law, sec. 2968.

This is done in this case. The judgment of the court below must be affirmed.

 NOAH COLLINS v. THE STATE.

CRIMINAL LAW. *Larceny. False pretense.* Where goods are obtained by stratagem, artifice or fraud, it is larceny where the owner intends to part only with the temporary possession, for a limited time or specific purpose, retaining the ownership in himself, and it is obtaining goods by false pretense where the owner intends to part with the property absolutely.

 FROM MADISON.

Appeal in error from the Common Law Court of Madison county. T. C. MUSE, J.

Collins v. The State.

CARUTHERS & MALLORY for Collins.

E. L. BULLOCK for the State.

DEADERICK, C. J., delivered the opinion of the court.

Collins was convicted in the law court of Madison county, of petit larceny, upon an indictment of two counts, one for larceny and the other for obtaining goods under false pretenses.

The verdict for larceny was a virtual acquittal of the charge of obtaining goods on false pretenses. The facts show that Collins got money of Moses Clanton, to be used in buying medicine for him, Clanton. Although larceny may be committed by obtaining goods from the owner by stratagem, artifice or fraud, it must be a case in which the owner intended to part only with the temporary possession for a limited specific purpose, and not to part with the property absolutely: 3 Greenl. Ev., sec. 160. Thus obtaining silver money which was to be replaced by gold, was no larceny: *Id.* Because it was not intended or expected that the specific thing obtained was to be returned. And this constitutes the distinction, where goods are obtained by stratagem, etc., between larceny and obtaining goods by false pretenses. In the latter case the owner intends to part with his property absolutely and convey it to the prisoner. To constitute larceny, however, the owner must intend to part only with the temporary possession for a limited and specific purpose, retaining the ownership in himself: *Id.* As for example, if one obtain a horse by stratagem,

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by loan or hire, to be returned, and ride him off and sell him, with intent to deprive the owner of him, this would be larceny.

In this case Moses Clanton let the defendant have the money to buy medicine and parted with it absolutely, not intending that the money was to be returned to him, so that he did not retain the title of the money in himself, but expected to get some other thing in its place, and it is for stealing the money he is convicted. This transaction would be more near the definition of obtaining goods under false pretenses than of larceny, but of the former offense defendant was acquitted. No motion in arrest of judgment was made, but a motion for a new trial was entered and overruled.

The evidence does not sustain a verdict of guilty of larceny, for the facts proved do not make a case of larceny, and the judgment must, therefore, be reversed.

Alsup v. Clarke.

O. M. ALSUP, Adm'r, v. MARGARET E. CLARKE, *et al.*

WILL. *Construction.* A testator, by his will, charged the property given to his children with a "comfortable support" for his two widowed sisters, (who had been living with their children on one of the testator's plantations and been supported by him), "equal to what they now have," so long as they shall live unmarried, "or shall have need of this aid." *Held*, that the will created a trust in favor of the sisters for a fixed support in board, lodging and clothing, such as they were receiving from the testator at the date of the will, without reference to the performance of services by them, such as they had been in the habit of rendering during their brother's life, until they married, or until there was such a change in their pecuniary condition as to render the aid unnecessary. *Held*, also, that a discretionary power, conferred upon the executor by an independent item of the will, to see to the support of the sisters, and "fix the amount thereof in his discretion," which was never exercised, would not affect the trust.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

METCALF & WALKER and W. P. WILSON for complainant.

HARRIS & TURLEY for defendants.

COOPER, J., delivered the opinion of the court.

The question raised by this record is, whether the defendants, Margaret E. Clarke and Jane B. Hill, are entitled to any, and what provision under the will of their brother, J. S. Houck, who died in 1879. The

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first two items of the will direct the payment of debts, and make provision for the testator's widow. Then follows :

"Item 3. All the rest and residue of my estate, real and personal, of every kind and wherever situated, I give, devise and bequeath to my children, living at the time of my death, or born thereafter, to be divided equally among them, absolutely and in fee. But this provision in behalf of my children is subject to the following charge: I have two widowed sisters, now living in Tunica county, Mississippi, viz: Mrs. Margaret E. Clarke and Mrs. Jane B. Hill. It is my will that so long as my said sisters, or either of them, shall live, or shall have need of this aid, they and the survivor of them, shall receive a comfortable support out of my estate, equal to what they now have; and the interests of my children taken under this will, whether in the hands of my executor, or of the guardian of the children, are to contribute equally to furnish this support, and being charged thus, this provision for my said sisters is not to interfere with or delay the settlement of the estate by the executor, and the turning over the interests of the children to their guardian."

The fourth item of the will recites the fact that the testator has large interests with Thomas B. Turner in plantations in Tunica county, Mississippi, planting operations therein, stock, crops, etc., money loaned, etc., and then gives Turner, as survivor and as executor, full and discretionary power to wind up their joint concerns. By the fifth item Turner is appointed ex-

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ecutor of the will, and testamentary guardian of the testator's children, without being required to give security in either capacity. The sixth item confers upon Turner unlimited power in the management of the estate, and the sale and re-investment of property. It contains also this clause: "Both as executor and guardian, the said Turner is to see to the support provided for my two sisters, and fix the amount thereof in his discretion; and amounts paid out therefor shall be good vouchers in his accounts upon his own statement thereof, without receipts or vouchers."

The seventh item gives to Turner full power to manage the estate of the children, to sell their property and make investments, and to regulate their expenditures. The last two items of the will are as follows:

"Item 8. It is my express will and intention that the large powers and discretion hereby given to said Turner as executor and guardian, shall be considered as a matter of personal confidence and trust, and as such limited and confined to him, and not in any way to pass to, or vest in any other person who may become my personal representative or guardian of my children. As to any other person, who may occupy these positions, it is my will that the law, strictly administered, shall be the measure of power, with all the safeguards of bond and security, and all the limitations upon private action and judgment which the law prescribes and provides.

Item 9. It is my will, and I do hereby expressly provide, that the provision made for my two sisters

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in item three of this will is to have effect only so long as they shall continue unmarried; and upon the marriage of either of them, the provision will at once cease as to her."

The will was probated, and Turner qualified as executor and guardian in November, 1879. He died April 16, 1883, having been confined to his house for twelve months before his death, and unable during that period to give active attention to business. The complainant, Alsup, was appointed administrator *de bonis non*, with the will annexed, of the testator's estate after the death of the executor, and filed the present bill for the construction of the will. The estate owed no debts of any consequence, and Turner, as executor and guardian, received about \$118,000 of personal assets, about \$90,000 of which in value, were income-producing stocks and bonds. The testator also died seized of real estate in Tennessee and Mississippi of considerable value. The testator left a widow, who only survived him a few hours, and four children, all of whom were under age at the filing of the bill.

Mrs. Clarke, one of the testator's sisters, was about sixty years of age when the depositions were taken in this cause, in feeble health, having only one child, a son, of age. Mrs. Hill, the other sister, was about fifty years of age, with four children, the oldest of age. These women had been living for several years before the testator's death, with their children, on a plantation in Tunica county, Mississippi, owned by the testator and Turner, and had been furnished with supplies from Memphis. They were dressed comfortably,

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and had an abundant table. But they did all the house work themselves, such as cooking, washing, milking, etc. After the testator's death they continued to reside on the place as before, the plantation for the year following the death of the testator being run by Turner, the son of Mrs. Clarke, and the oldest son of Mrs. Hill. Turner then sold the plantation to his associates on time for \$20,000, of which they have paid \$2,000, and the unpaid balance of purchase money is largely more than the property is worth. Neither of the mothers or their children had any property or means, nor have the women ever acquired any. Turner paid them nothing under the testator's will.

By the third item of his will, as modified by the ninth item, the testator charges the real and personal property given to his children with "a comfortable support" for his sisters, "equal to what they now have," so long as they, or either of them, "shall live unmarried, or shall have need of this aid." The charge and bequest are plain and positive, as much so as any provision of the will, not subject to the discretion of any person so far as these items are concerned. And the amount of the charge is fixed with reasonable certainty, for a comfortable support, equal to what they had at the date of his will, February 3, 1875, was susceptible of easy ascertainment. The only point of doubt would be as to the meaning of the words "or shall have need of this aid." Was it the intention of the testator, as now contended for on behalf of his children, to limit the bounty given his sisters, to such a part of the "comfortable support" mentioned as

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might remain after deducting the wages they, the sisters, might earn for work similar to that performed by them on his place? Or was the intention to furnish them a fixed support, such as they had been in the habit of receiving from him, until the pecuniary condition of the sisters should be so changed as no longer to require the aid? In the one view, the only bounty would be the mere deficit over wages earned, and the legatees would be required, like a dismissed servant, to seek for employment in order to lessen the charge on their brother's estate. There would be no gift, whatever, if any person, even their own sons, were willing to furnish them board, lodging and clothing for such services as they could render. We do not think the testator intended that his bounty, limited as it is, should be measured in this way by a one-ounce vial. He intended to give them a comfortable support for life, measured by their previous habit and condition, without reference to their capacity for work, and whether they worked or not, if their own pecuniary condition continued to require it. And certainly there is nothing in the proof to show any change in this respect. If not supported by the bounty of the testator, they must be supported by the bounty of others, or their own labor. The bequests are not made to depend on either of these contingencies, and were intended to give "a comfortable support" out of the estate, that is board, lodging and clothing, such as they were having at the date of the will, said support to date from his death.

But, it is argued on behalf of the children, the

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amount of the bounty is left, by the sixth item of the will, to the unlimited discretion of Turner, and as he paid the sisters nothing in his life time he must have exercised his discretion against them, and as he is now dead the discretion has gone with him. But the power conferred by the sixth item of the will is entirely distinct from the trust or charge created by the third item. The gift continues, even if the power be not exercised. A clear distinction exists, says Judge Wright, between a power, and the estate and trusts, the subject matter of the power. While the power may be gone, or be incapable of transmission, the trusts may still remain and be executed: *Belote v. White*, 2 Head, 703. The intention of item sixth was to confer a personal power upon the executor, under which the bounty might have been increased, and not to interfere with the positive bounty of the third item, for he is expressly required "to see to the support provided" thereby. And even if the two items are to be read together, there would be a power coupled with a trust, and the trust would be executed although the power has not been exercised: *Robertson v. Gaines*, 2 Hum., 367, 378; *Cruse v. McKee*, 2 Head, 1. And the courts will act retrospectively in executing these powers as *quasi* trusts: *Maberley v. Turton*, 14 Ves., 499; *Edwards v. Grove*, 4 De G. F. & J., 222.

The chancellor came to the same conclusion, except that he dates the bequests from the death of the executor, and, upon a reference, fixed the support at thirty dollars a month for each sister, which is well warranted by the proof.

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The decree below will therefore be affirmed with the modification above stated, and the cause remanded for the execution of the decree, and such further orders as may hereafter be required. The complainant will pay the costs of the cause out of the assets of the estate.

A. KIMBRO and WIFE, v. JOHN JOHNSTON, *et al.*

WILLS. *Legatees to take per capita. When.* Under a bequest to particular children and grand-children equally, the legatees will take *per capita*, in the absence of anything in the will showing a different intent.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

MALONE & WATSON for complainants.

JOHNSTON & FORD for defendants.

COOPER, J., delivered the opinion of the court.

On December 11, 1882, Appless Ford died in Shelby county, testate, and the defendant, Johnston, qualified as administrator of her estate with the will annexed. She left surviving as her heirs and distributees three daughters, A. E. Ford, Sallie Taylor

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and A. F. McMullen, four granddaughters and one grandson, the children of Mary F. Rains, a deceased daughter, three grandsons and three granddaughters, the children of James N. Ford, a deceased son. The will of the testatrix is in the following words: "I make and publish this my last will and testament, hereby revoking all others made by me. I desire that my notes, consisting of \$8,500, be divided equally between A. E. Ford, Sallie Taylor, Eleanor Malloy, Mary's daughters, James' daughters; my personal property be divided between Ada Rains and A. E. Ford." The bill is filed to obtain a construction of the first clause of the will disposing of the notes, there being no contest as to the second clause. And the question is whether the proceeds of the notes are to be divided between the legatees *per stirps* or *per capita*.

Eleanor Malloy, one of the legatees named, is the complainant, the wife of A. Kimbro, and is one of the two children, the other child being a boy, of A. F. McMullen, a living daughter of the testatrix. It is conceded that the legatees described as Mary's daughters in the bequest, are the children of Mary F. Rains, the deceased daughter of the testatrix, who also left one son; and that James' daughters are the children of James N. Ford, the deceased son of the testatrix, who also left three sons.

It is conceded by the learned counsel of the complainants that, by the English authorities, the legatees under the present bequest would take *per capita*, each of the daughters of Mary and James receiving an equal share with the other named legatees. But

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the counsel thinks that the weight of American authority is otherwise. In this State, however, we have invariably followed the English rule of construction, in the absence of anything to show a different intent. *Ingram v. Smith*, 1 Head, 412; *Malone v. Majors*, 8 Hum., 577; *Seay v. Winston*, 7 Hum., 472; *Purveyor v. Edmondson*, 4 Heis., 43; *Parrish v. Groomes*, 1 Tenn. Ch., 581; *Rogers v. Rogers*, 2 Head, 660; *Beasley v. Jenkins*, 2 Head, 191; *Rodgers v. Rodgers*, 6 Heis., 489. The will before us shows a selection by the testatrix of the objects of her bounty out of persons standing in the same relation to her with others of the same *stirps*. There is nothing, either in the will or the circumstances, to take the case out of the general rule.

The chancellor's decree will be affirmed. The appellants will pay the costs of this court. The costs below will be paid as directed by the chancellor.

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A. M. BOYD *et al.* v. THOMAS H. ALLEN.

MORTGAGE PRIORITY. *After acquired title by junior mortgage.* B. had a prior and A. a junior mortgage upon a tract of land executed by S. A. afterwards bought the interest of S. and redeemed the land from the State which had purchased at tax sale. A. claimed to hold the land under the tax deed free from incumbrance of B.'s mortgage. *Held*, that by purchasing the title to the land acquired at tax sale, he could not thereby overreach the prior mortgage of B.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

C. F. VANCE and R. J. MORGAN for complainants.

WRIGHT & FOLKES for defendants.

COOKE, J., delivered the opinion of the court.

In 1856 complainant, A. M. Boyd, sold a plantation, known as the Donelson plantation, containing 1,577 acres, in Bolivar county, Mississippi, to A. J. Donelson. On February 16, 1867, A. J. Donelson executed a deed of trust upon said lands to one E. H. Martin, as trustee, to secure a balance of purchase money remaining due to A. M. Boyd of \$25,955.71.

On September 20, 1871, said Martin, trustee, executed said trust, and sold said land to Martin Donelson, a son of A. J. Donelson, at the price of \$15,000, which seems to have been the balance of the purchase money then remaining due, and Martin Donelson

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executed his note to A. W. Boyd for this amount, together with the further sum of \$2,000 loaned him by said Boyd, and which he secured by a deed of trust upon said plantation, executed the same day, to Alston Boyd, son of A. M. Boyd, as trustee. On January 3, 1873, Martin Donelson sold said lands to J. W. Farrell, J. M. Farrell, W. T. Simpson and M. E. Simpson, at the price of \$25,000—\$10,000 of the purchase money being paid down, and for the residue executed their three several promissory notes to said Martin Donelson for \$5,000 each, payable respectively upon the first day of January, 1874, 1875 and 1876, and which they secured by a deed of trust upon said lands executed to Alston Boyd as trustee, which included all the stock, farming implements, and upon the plantation, and which was assigned by Martin Donelson to A. M. Boyd as collateral security for the purchase money notes due him from said Donelson. Said Farrells and Simpsons went into the possession of said plantation, and cultivated the same until about March 22, 1875, up to which time complainant's, A. M. Boyd's debt, had been reduced to about the sum of \$11,799.55, and said Simpsons and Farrells had become indebted to respondent, Allen, in the sum of \$3,996.41, and for which he had no security. In the meantime the Simpsons and Farrells had disagreed to such an extent that they could no longer operate upon said plantation together, and at this juncture an arrangement was effected by which the Simpsons were to assume the indebtedness to Allen, as well as the purchase of the plantation and payment of the unpaid

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purchase money due complainant, A. M. Boyd and the Farrells to be let out entirely. At this time two of the three \$5,000 notes executed by them for the purchase money of the lands were past due, and an arrangement was made with A. M. Boyd, by which he was to extend the time of credit upon the amount of purchase money due him by taking the notes of the two Simpsons, payable in annual instalments, of one, two, three, four and five years, and to reduce the rate of interest from ten per cent., which Donelson was paying him, to eight per cent. per annum. In accordance with this arrangement five notes were executed by M. E. and W. F. Simpson to A. M. Boyd, each for \$2,359.91, dated March 22, 1875, payable respectively upon January 1, 1876, 1877, 1878, 1879 and 1880, each bearing interest at the rate of eight per cent. per annum. To secure these notes, M. E. and W. F. Simpson executed a deed of trust to Alston Boyd as trustee upon said lands, and the same personal property embraced in the trust deed executed by them and the Farrells on January 3, 1873, as above stated, and Alston Boyd released said last mentioned deed of trust by executing to them a quitclaim. An arrangement was also made with respondent, Thomas H. Allen, by which he took the note of said Simpsons for the indebtedness of said Farrells and Simpsons to him for \$3,996.41, and to secure which, and a further indebtedness of not more than \$8,000, which said Allen had agreed to advance to them with which to run the plantation, said Simpsons executed another or second deed of trust to one Brown, as

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trustee, upon the same plantation, stock, farming implements, etc., embraced in said deed of trust to Boyd, and such additional stock, etc., as they had acquired since the execution of their first deed of trust in 1873, and also upon all the crops of every description to be raised upon the plantation that year. This deed of trust was dated March 23, 1875. These last mentioned two deeds of trust were registered in the order in which they were executed, that for the benefit of complainant, A. M. Boyd, which was dated March 22, 1875, having been registered some days before the one for the benefit of Allen.

On March 12, 1878, respondent, Allen, purchased the interest of the Simpsons in said plantation of one of the Simpsons, the other one having become insane, who executed a deed to him of that date therefor, and surrendered the possession of the same to him, and left the country, being entirely insolvent, and on the same day said Allen *redeemed* said lands from the State of Mississippi, the Simpsons having permitted the same to be sold for the taxes due thereon for the year 1876, and allowed the time for redemption to expire, and a deed for said land was executed to said Allen therefor by the Auditor of Public Accounts for the State of Mississippi, which is also dated March 12, 1878, but which respondent, Allen, shows by his testimony was not delivered to him until some days after its execution.

Allen being in possession of said lands, set up claim to hold them, by virtue of said tax title, adversely and in hostility to the prior deed of trust of

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A. M. Boyd, and the parties all being residents of Tennessee, this bill was filed to enjoin the respondent, Allen, from setting up or relying upon said tax deed as against the deed of trust of complainant, to compel him to execute a quit-claim as against said deed of trust, and to have said tax deed declared invalid upon various grounds alleged.

The bill alleges in substance that the arrangements by which the Farrells were released from the indebtedness of themselves and the Simpsons to A. M. Boyd, and to Allen, and the two deeds of trust to secure Boyd and Allen respectively, executed by the Simpsons as above stated, were in reality one transaction, which was brought about and procured by Allen as a means of securing his debt, and that he promised and undertook to see that the taxes upon the plantation were kept paid up, and for that reason the complainants did not look after that matter, and that the procurement of the tax deed by respondent, Allen, in the manner he did, and his failure to see that the taxes were paid was a fraud on his part upon the rights of complainants. Answer upon oath was expressly waived, and the respondent denied very positively all the material allegations of the bill.

The chancellor granted the relief sought, and the Referees have reported that his decree should be affirmed. The exceptions open the whole case.

The trustee, Alston Boyd, who attended to the matter as agent for his father, A. M. Boyd, testifies positively that respondent, Allen, did agree to see that the taxes were kept paid up, and that he subsequently,

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upon different occasions, told him that he was looking after the taxes on the plantation, and having them paid. The respondent as positively denies these statements. There is no other direct testimony upon this question. The circumstances, we think, tend strongly to support the testimony of the witness, Boyd. At the time of these transactions, as we have seen, complainant's, A. M. Boyd's, debt, amounted to \$11,799.45, which was bearing ten per cent. interest, and amply secured upon a plantation which had twice been sold for as much as \$25,000, and which we may fairly presume was worth about that sum, beside a considerable amount of personal property. Allen's debt amounted to \$8,996.41, for which he had no security. It is shown by the record that the respondent, Allen, either prepared the firm notes that were executed to Boyd in lieu of the original notes, or had it done, and procured the signature of the Simpsons to them, and for this purpose obtained possession of the original notes from Boyd, and executed his receipt for them, which is exhibited in the record; and Allen, in his testimony, denies that he knew any thing about this receipt, or that it was executed at his place of business, but upon his attention being called to the fact that it was written on paper that contained the letter head of his firm, admitted that it was written at his counting-rooms, and is in the hand-writing of his clerk. By procuring for the Simpsons extended credit, upon smaller annual payments and a reduced rate of interest, would better enable them to pay off this indebtedness by the production of successive crops.

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as well as his own unsecured debt of near \$4,000; besides he was procuring by the arrangement a second mortgage upon property which appeared to be, and, we think, was not only ample security for the debt of Boyd, for which it was first liable, but also for his unsecured debt of \$4,000, as well as the \$8,000 he undertook to advance to them. The Simpsons had also permitted the lands to be sold for the taxes of 1874 and 1875, and purchased by the State, and respondent, Allen, did, in September, 1876, furnish them the money, amounting to over \$1,000, with which to redeem it. He, in his answer, states that it was a very common practice for tax-payers to permit their lands to be sold for taxes, and bought in by the State, and held for a considerable time, as by this means they avoided the payment of these taxes as they became due, and could make easy terms with the State for the redemption of their land. He had advanced to the Simpsons money with which to pay off one of their notes to complainant, or had paid it for them, and on the same day upon which he took the deed of Simpson for the land, and procured the execution of the tax deed to himself, he also paid the second one of said notes to complainant, and which reduced his debt against the Simpsons, secured by his trust deed, to about \$7,000, besides interest. As Allen had embraced in his deed of trust all crops of all descriptions to be raised upon the lands, he admits that the Simpsons had no means with which they could pay the taxes except as advanced by him under his agreement to advance them, not exceeding \$8,000.

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The consideration expressed in the face of the deed from Simpson to respondent, Allen, is \$4,000 in cash, and the payment on that day to complainant, A. M. Boyd, the second note of \$2,359.91, and eight per cent. interest thereon from March 21, 1879. Allen admits that he paid no money to Simpson, but says the actual consideration was the Simpsons' indebtedness to him at that time, together with the amount then paid by him to Boyd, due upon this second note, and which altogether amounted to about \$6,000, which was about \$2,000 less than the amount he had agreed to advance them. Nor is it shown that he ever did advance them any greater amount. The amount of taxes for 1866, for which the lands were sold was about \$500. The entire amount due to complainant and respondent at the time of this transaction was about \$13,000, secured on a plantation worth, as we have seen, about \$25,000. At the time respondent paid said second note of the Simpsons to complainant, Boyd, and which, as we have seen, was the same day he took Simpson's deed, and procured the execution of the tax deed to the land, he neither informed Boyd of these transactions, nor gave him any intimation that the taxes had not been paid, nor did he ever register Simpson's deed to him, nor did he give any notice that he was not going to continue to advance the money to pay the remaining notes as they fell due. Nor was it until the third note became due, and he was called on to pay it as he had done the others, that he revealed the fact to complainant that he had purchased the Simpsons' interest

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in the land, and had procured said tax deed to said land, and upon which he intended to rely to overreach complainant's deed of trust. It was alike to the interest of respondent, as well as complainant, that these taxes should be paid. He had by the arrangements that were entered into obtained security for a large debt for which he had none before, and no chance of any. There was no means by which the owners of the lands could pay the taxes except as he advanced them under his agreement. His actual advancement of over \$1,000 for that purpose, all goes to corroborate the testimony of Boyd, and satisfy us that it was understood that the taxes on the plantation were to be kept paid up out of the moneys, not exceeding \$8,000, which respondent, Allen, was to advance. When he purchased Simpson's interest he had secured not only his debt, but this valuable plantation, subject to complainant's lien of about \$7,000, besides some interest. It was his interest that these outstanding taxes which had been bid upon the land by the State of Mississippi should be paid off, which he did, and having the land secured, at any rate subject to the incumbrance of complainant's deed of trust, he had nothing to lose by the experiment of attempting to get rid of it by setting up this tax deed.

But if there had been no such understanding or agreement in relation to the payment of taxes, the respondent as mortgagee, and especially as purchaser from Simpson, could not, we think, by the redemption of the lands from the State, and taking this tax

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deed, acquire any better title than he already had, or be permitted to set it up in hostility to the title of his mortgagor, or vendor, Simpson. "The tax is upon every possible interest in the land, and all parties having interests are equally under obligation to the State to make payment": Cooley on Taxation, 351. "While a mortgagor in general cannot be allowed to cut off his mortgagee by buying in the land at a tax sale," says Judge Cooley, "yet if the mortgagee were in possession, receiving the issues and profits, and bound to pay the taxes himself, it might not be *so clear* that the mortgagor should be precluded from taking advantage of the mortgagee's neglect. If it were to be so held, there would seem to be reason for holding that the mortgagee, by reason of his relation to the title, was precluded from becoming purchaser of the mortgagor's interest at a tax sale, and that his remedy would be confined to a payment for the protection of his lien, with a remedy over for the amount paid. It cannot be said in such a case that either mortgagor or mortgagee is under no obligation to the government to pay the tax. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgagor nor mortgagee was at liberty to neglect the payment, as one step in bettering his condition at the expense of the other, but that the presumption of law should be, that the party purchasing did so for the protection of his own interest merely": Cooley Tax., 347-8.

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This precise question has not been decided by the Supreme Court of Mississippi, so far as appears by the cases to which we have been referred, and to which we have had access. It was discussed, and the conflict of authorities upon the question referred to in the case of *Martin v. Swafford*, 59 Miss., 331, but the case was decided upon other grounds. It was, however, held in that State that a mortgagee could not, by purchasing the title to the land at a tax sale, overreach a mechanic's lien, which was superior to that of his mortgage: *McLaughlin v. Green*, 48 Miss., 175. Also, that one tenant-in-common would not be permitted to rely upon a tax title purchased in by him as against the title or right of his co-tenant: *Allen v. Bole*, 54 Miss., 334. We think the principle involved here is clearly recognized in the above, and other cases to which we have been referred of similar import, but which need not be cited. But if the question was conceded to be an open one in Mississippi, as is contended for the respondent, while we are aware that the authorities are conflicting, we think this view of the question is supported by the better reason.

Chancellor Cooper, upon a review of the principal authorities, decided that a mortgagee of realty, even if the conveyance contain provisions which render it void as to other creditors of the grantor, cannot, by purchasing the property at a tax sale, acquire any title inconsistent with that held under his deed: 3 Tenn. Ch., 40; and also, that one who occupies such a fiduciary relation as to make it his duty to pay

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the taxes, can acquire no additional title by purchasing at a tax sale: 1 Tenn. Ch., 625.

While the deed executed to Allen by Simpson, and the tax deed in question procured by him from the Auditor of Public Accounts of Mississippi, bear the same date, as we have seen, Allen shows by his testimony that the tax deed was not delivered to him until some days after its execution. He also states that Simpson, upon the execution of his deed, delivered him the possession of the lands in question. It is, therefore, apparent that he took possession under Simpson's deed, and was a purchaser from him before he obtained the tax deed. By the laws of Mississippi, a deed does not take effect until its delivery: *McGhee v. White*, 2 Simp., 41. It is, therefore, fair to assume that Allen went into possession of the lands under his purchase from Simpson, and could not occupy any better position. "If there be an incumbrance upon a vendor's title, or an adversary title, and it be extinguished by the vendee, it will inure to the benefit of the vendor, who will be bound to make an abatement in the purchase money equal to what it cost to clear the title. This is the result of the relation": *Meadows v. Hopkins*, Meigs, 181. This (and the preceding cases in conformity with it) has been uniformly followed in Tennessee, and this case was cited and approved by the Supreme Court of Mississippi in the case of *Hardeman et als. v. Cowan*, 10 Smedes & Marshall, 486. In the view we have taken it is unnecessary to determine as to the validity of the tax deeds, and as that question depends exclu-

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sively upon the laws of Mississippi, and could be of no general interest here, we have not deemed it necessary to investigate or decide it.

The result is, the report of the Referees is approved, and the decree of the chancellor will be affirmed with costs.

MARIA K. SMITH v. J. H. SMITH *et al.*

1. **ANNUITY.** *Mortgage.* When two persons agree to pay an equal annuity to a third person, each securing the payment of his moiety by mortgage of realty, with a stipulation that at the death of the annuitant and the payment of funeral expenses, any part of the annuity remaining should be equally divided between them, the annuitant is entitled to the annuity from each, and to enforce the mortgage against either, and it is no defense that the annuitant has failed to make the other party pay, the right to the surplus, if any, only accruing after the death of the annuitant.
2. **SAME.** *Revivor. Personal representative.* After a decree for the arrears of an annuity rendered in this State in favor of a non-resident, upon a contract made in another State, if the annuitant die pending an appeal to this court, the suit may be revived by the personal representative of the annuitant, and such representative may be appointed by the county court of the county in which the decree was recovered.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

T. W. BROWN for complainant.

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H. C. KING for defendant.

COOPER, J., delivered the opinion of the court.

The petition for rehearing in this case, which was decided from the bench, states no fact overlooked at the hearing, or any new principle of law, and might therefore be dismissed under our practice. If we do so far yield to the earnestness of counsel as to state the facts and our conclusions, it is out of deference to counsel and client rather than because the case requires it.

On November 10, 1874, Abram Smith died in Shelby county, Ky., leaving a widow, the complainant, Maria K. Smith, a son, G. W. Smith, by her, and another son, the defendant, J. H. Smith, by a former wife, surviving him, as his heirs and distributees. He made a will devising his residence and furniture therein to his widow for life, and then to his son, G. W. Smith, in fee, dying intestate as to his other property. On November 16, 1874, an agreement was entered into between the widow and the two children, by which a certain fund was settled in trust for the benefit of the widow for life, to be equally divided between the children at her death. On December 28, 1874, the defendant, J. H. Smith conveyed his interest in this fund to his wife, the defendant, Emily J. Smith. On November 20, 1875, all of these parties entered into an agreement in writing, by which it was agreed that the *corpus* of the fund mentioned in the previous agreement should be divided between G. W. Smith and Emily J. Smith, in consideration whereof these

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parties undertook each to pay quarterly an annuity, for the "support and maintenance" of the widow during life, of \$265.56, and at her death, and after the funeral expenses are paid, should there be any of said annuity remaining, the same to be equally divided between G. W. Smith and E. J. Smith. It was further provided that if the annuity should prove insufficient to support and maintain the widow in comfort, and pay her burial expenses, the deficit was to be supplied by contribution by said G. W. and E. J. Smith and J. H. Smith *pro rata* upon the sum received by them under the division of the fund. It was further agreed that G. W. Smith, J. H. Smith and Emily J., his wife, should give to Maria K. Smith, the widow, a mortgage on real estate as security for the faithful performance of all the stipulations on their part contained in the agreement. G. W. Smith did accordingly execute to the widow a mortgage on realty in Kentucky, and J. H. Smith and Emily J., his wife, executed a similar mortgage on realty in Memphis, Tenn., where they resided. The defendants, Smith and wife, continued to pay the annuity until August 20, 1878, when a quarterly payment fell due, and was not paid. Since that time they have not paid any part of the annuity.

The bill was filed February 26, 1879, by the widow against J. H. Smith and wife, and the trustee in their mortgage or trust deed, to enforce payment of the annuity, and for this purpose to foreclose the mortgage, if necessary. Upon final hearing the chancellor granted the relief sought, and the Referees recommend

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an affirmance of the decree. Smith and wife except to the report.

The defendants filed a joint answer to the bill, in which they admitted the agreement, the execution of the mortgage, and the failure and refusal to pay as charged in the bill. The defense set up was that the complainant had not required her son, G. W. Smith, to execute a mortgage to secure his part of the annuity, nor compelled him to pay the annuity. The proof is that G. W. Smith did execute a mortgage, as he had agreed to do, and he himself deposes that he paid his part of the annuity in settling, as the agent of his mother, her accounts and expenses. The chancellor and Referees have found that the facts do not warrant the defense, and we cannot say that they have erred in so finding, although there is some evidence tending to disprove the payment of the annuity, for a part of the time, by G. W. Smith, but rather inferentially than directly.

Upon the assumption that G. W. Smith, has not paid his part of the annuity, the argument on behalf of the defendants is, that the agreement provides for a division between G. W. and E. J. Smith of any of the annuity remaining at the death of the widow, after the funeral expenses are paid, and, therefore, the defendants have the right, as a condition precedent to the performance of their part of the contract, to require the annuitant to collect the other part of the annuity for their benefit in a possible contingency. It is not pretended that it is so nominated in the bond. On the contrary, the agreement provides for the prob-

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able event that the annuity may not be sufficient for the support of the annuitant. And the proof is clear that she had no other income, and the whole annuity was needed for her decent support. She had the right during her life to receive, and consequently to enforce, the collection of the annuity. The right of the other contracting parties to any surplus, after the payment of burial expenses, could only commence after the death of the annuitant. It is a matter to be settled between the administrator of the annuitant and the other parties to the agreement. Very probably, when the right accrues, the defendants may hold G. W. Smith to an account for his share of the annuity, and be subrogated to the rights of the annuitant under G. W. Smith's mortgage. They cannot in this suit, to which G. W. Smith is no party, and where the annuitant has died since the recovery in the chancery court and the appeal to this court, have a determination of the question.

Both upon the facts and the law, therefore, it is clear that defendants have no standing upon the merits.

The very learned counsel of the defendants insists, the complainant having died since the decree in the court below and the appeal to this court, that the action cannot be revived. "The complainant," he says, "not dying in this State, and never having lived here since the making of the contract, the contract being also foreign to this State, the action necessarily died with her, and did not pass by succession." He cites no authority, and submits no argument in support of the position. By the North Carolina act

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of 1794, antedating the organization of the State government, always in force and brought into the Code, sec. 2854, it is provided: "No appeal or writ of error in any cause or court shall abate by the death of either plaintiff or defendant, but may be revived against the heir or personal representative." And by the act of 1836, ch. 77, brought into the Code, sec. 2846: "No civil actions commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived." It is obvious, therefore, that by plain and express statute neither the cause of action nor the appeal abated by the death of the complainant. And by statutes brought into the Code, sec. 2203, it has long been provided that administration may be granted upon the estate of a person who resided, at the time of his death, in some other State or territory of the Union, or in a foreign country, by the county court of any county in the State, where the deceased had any goods, chattels or assets, or any estate real or personal, at the time of his death, or where the same may be when letters are applied for; where any debtor of the deceased resides; or where any suit is to be brought, prosecuted or defended in which said estate is interested. And, without any statute, the doctrine of the common law in relation to *bona notabilia* would authorize administration in this case: *Swancy v. Scott*, 9 Hum., 329. The point made by the learned counsel is, consequently, not well taken.

The petition for rehearing is refused with costs.

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TOM FITZGERALD v. THE STATE.

CRIMINAL LAW. *Homicide*. Ordinarily, if a party assaulted kills his adversary in the conflict, he will be guilty of manslaughter only, the presumption being that the assault has excited his passion beyond control, and that he acts from sudden heat of passion and not from malice. But if the resistance of the assault is made by a deadly weapon, and the weapon is used in a cruel manner, not at all justified by the nature and danger of the assault, the offense amounts to murder.

FROM WEAKLEY.

Appeal in error from the Circuit Court of Weakley county. CLINTON ADEN, J.

H. H. BARR for Fitzgerald.

ATTORNEY-GENERAL LEA, JNO. MCGLOTHLIN and N. N. EDWARDS for the State.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff in error was convicted of murder in the second degree and sentenced to ten years' confinement in the penitentiary, and has appealed to this court.

The evidence shows that deceased and defendant met at a church in Dresden, on the 19th of September, 1882. Deceased was intoxicated; some of the witnesses say he staggered. On first meeting, the defendant asked deceased about a lie that the latter had told on him, to which deceased made no reply, and passed on. They had been unfriendly and had had a quarrel some time before. Near the church, after some

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play amongst a crowd of negroes there assembled, defendant and deceased wrestled, and both fell; some quarreling ensued and the lie passed; deceased said to defendant, if it had not been for the respect he had for his, defendant's, mother, he would have whipped him long ago. To this defendant replied, with an oath, he did not want him to have any respect for his mother. They were separated by by-standers, and defendant said, "if he touches me, I intend to kill him." Defendant had a knife in his hand at the time. Deceased had no weapon; he had a knife but put it in the pocket of his duster before the difficulty.

Defendant and others, after the meeting closed, started home, and Ben Hamilton was holding deceased, and defendant told him "to turn him loose," and in the quarrel defendant "run his hand in his pocket." Deceased got out of his duster and pursued defendant. The stabbing occurred near Cottrell's gate, when defendant said, "damn him, if he touches me, I'll kill him. I'm ready for him." Deceased ran up, and defendant said, "stand back, I don't want to hurt you." Deceased went up to him, and some of the witnesses say, put his hand on him, others, struck him, and defendant began striking deceased, putting one arm around deceased and striking him repeatedly with the other. One witness states when deceased struck, defendant put his left arm around him and said, "damn you, come into me," and she heard a sound like something tearing, and saw repeated blows by defendant; that deceased, as defendant struck the first blow, grunted and bent forward, and then de-

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fendant threw his arm around him and repeated the blows. The deceased had received a number of knife wounds on the sides, shoulder, head and face, and died within twenty-four hours.

Just after the difficulty, defendant told a witness that he put his arm around deceased and held him until he cut him several times, and that his knife broke in the difficulty. And to another witness he said, within two hours after the stabbing, if he had had a better knife he would have done what he intended to do.

The conduct of the deceased was certainly reprehensible; much of it may be attributed to his intoxication. He did not have, or appear to have, any weapons when he approached and struck or laid his hands upon defendant, and said he intended to whip him; nor does it appear that he afterwards struck, or attempted to strike, the defendant any other blow than the first, but seemed to be utterly helpless in the hands of the defendant, who held him with one arm and stabbed him to death with the other.

This is the second verdict of murder in the second degree, upon evidence, upon the last trial, somewhat stronger against the defendant than in the first.

Ordinarily, a party assaulted, if he kills his adversary in the conflict, will be guilty of manslaughter only, the presumption being that the assault has excited the passion of the slayer beyond control, and that he acts from sudden heat of passion, and not from malice. But if the resistance of the assault is made by a deadly weapon, and the weapon is used in a cruel

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manner, not at all justified by the nature and danger of the assault, the offense amounts to murder: 2 Bish. Crim. Law, secs. 724, 725.

Lord Tenterden, C. J., said that "it was not every slight provocation, even by a blow, which will, when the party receiving it, strikes with a deadly weapon, reduce the offense from murder to manslaughter, and if there had been any evidence of an old grudge, the crime would probably be murder": 2 Whar. Am. Crim. Law, sec. 995.

In this case we have the use of a deadly weapon, the existence of the old grudge, antecedent and contemporaneous threats, and after admissions which furnish strong evidence of malice.

The deceased, in his efforts to bring on a difficulty, in his state of intoxication, was not armed, and in his attack made no demonstration of the use, or purpose to use, a weapon.

The defendant said if deceased touched him he would kill him, and that he was ready for him, and to one who was keeping deceased back, "damn him, let him come," thus showing that he was then contemplating the use of the deadly weapon, in resistance of the invited assault. And when it was made, he at once resorted to his knife, thus showing that his act was most probably the result of malice, rather than sudden passion.

Says Hawkins: "Whenever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder, as if after the

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quarrel he fall into other discourse and talk calmly thereon," or so talk of the killing, etc.: 2 Bish. Crim. Law, sec. 737.

Directly after the stabbing, the defendant spoke of having broken his knife in the stabbing, and said if he had had a better one he would have done what he intended to do. To two other witnesses, to one within two hours after the difficulty, and to the other, perhaps at a later period, but before the death of deceased, he said the same thing; meaning, obviously, that he intended to kill deceased. His threats before, and in the act, and after declarations manifest that the fatal stabbing was the result of malice, rather than sudden passion.

We are of opinion, therefore—while at the former trial in this court we intimated that we would have been better satisfied with a conviction of manslaughter—that the evidence in the present record sustains the finding of the jury, and the judgment will be affirmed.

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THE STATE, for use, etc., v. W. E. BUTLER *et al.*

1. CORPORATIONS. *Forfeiture of charter.* Third parties cannot, under our laws, enforce the forfeiture of a charter. The State grants it and alone can take it away, but other parties in dealing with such corporations may inquire into their powers and obligations.
2. SAME. *Transfer of franchises.* A transfer of a mere charter conferring a franchise on certain persons to conduct a banking business, with which was granted immunity from other taxation than that expressly stipulated in the charter, does not convey the franchise to the transferee. A franchise is a right or privilege conferred by law, and is personal to the grantees, and cannot be transferred without the consent of the grantor.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. —
— Sp. Ch.

SMITH & COLLIER for complainant.

TAYLOR & CARROLL and T. B. TURLEY for defendants.

DEADERICK, C. J., delivered the opinion of the court.

This is an amended bill, filed August 16, 1884, in the chancery court at Memphis, by the State for the use of the creditors of the extinct municipality of the city of Memphis, who complain, by its receiver and back-tax collector, Lawrence Lamb, against the Bank of Commerce of that city, and others.

The bill recites that, on April 26, 1879, in pursuance of the act of the Legislature of 1879, ch. 92,

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a general creditors' bill against delinquent tax debtors of the city of Memphis, for the collection of back taxes, due and unpaid, had been filed, and this bill is an amendment thereto for the purpose of collecting certain back taxes from the Bank of Commerce, which are specified, and accrued from 1873 to 1878, inclusive, upon the bank building and lot, and upon \$150,000, the capital stock of said bank. The tax is resisted by the bank upon the ground that it is exempt from all taxation, by virtue of the provisions of its charter, except a tax of one-half per cent. on its capital stock.

The bill alleges that an act was passed by the Legislature February 23, 1856, incorporating Chandler and associates, under the name of "Chattanooga Savings Institution," with the usual banking privileges, which are specified, except to issue notes, etc., to be used as a circulating medium, and shall pay an annual tax to the State of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes.

By an act of November 19, 1859, said institution was authorized to remove its office to Memphis, Tennessee, and by an act of February 12, 1866, it was authorized to change its name to that of "The Savings Bank of Memphis." And by an act of March 12, 1873, said bank was authorized to change its name to that of "Bank of Commerce," by which it has since been known and called.

The bill further alleges, that no stock was subscribed, and no organization took place, by the Chat-

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tanooga Savings Institution in the city of Chattanooga; that in November, 1859, Chandler sold the act to W. B. Richmond, who commenced a banking business under the name of "Chattanooga Savings Institution," in Memphis, without organizing the corporation by opening books for subscription of stock, and issuing certificates of stock, but opened his bank and pursued business in buying and selling exchange and stocks, gold and silver, etc. The events of the war caused a suspension, and the business was not resumed under that name.

During the war W. B. Richmond was killed, and by his will bequeathed all his interest in the "Chattanooga Savings Institution" to his brother, Ben. Richmond; that in 1865 Ben. Richmond sold this same naked legislative act to M. J. Wicks, who procured the passage of the act of 1866, and soon after commenced the business under the name of "Savings Bank of Memphis," discounting notes, selling stock, dealing in exchange, etc., but opened no books for stock subscription, nor did he organize the bank by election of officers, etc., but the business was carried on by Wicks until 1872, when he sold the legislative act to R. A. Parker, who, with his associates, procured the passage of the act of 1873, changing the name to the "Bank of Commerce." It is alleged that these several transfers of the naked legislative acts, and carrying on the business without regular organization, were frauds upon the State and upon the treasury of the State, and operated as a forfeiture of all rights under the act.

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It is also alleged that although the business authorized by the act of 1856 was carried on for seventeen years in corporate names, a large part of the time no taxes were paid to the State, county or city, as required by section 3 of the act of 1856: that neither the Chattanooga Savings Institution nor Memphis Savings Bank ever paid the State the one-half per cent. required by the third section of that act.

It is insisted by the bill that said several transfers were inoperative to convey any title to the charter of said bank, or to exempt it from taxation under the third section of the act of incorporation; and that the franchises therein conferred cannot be transferred or assigned; that said section 3 is repugnant to the Constitution of 1870, and that no corporation had been organized under the act of 1856 prior to 1870; that neither Chandler, Richmond, Wicks, nor Parker, nor their associates, had done any acts prior to 1870 towards organization or payment of one-half per cent. tax to make the contract of exemption binding on the State, and by failure to organize and pay the one-half per cent., they severally, *ipso facto*, forfeited their right of exemption under the act of 1856; and the Bank of Commerce, by payment of municipal taxes on the bank's lot and building for 1873, 1874, 1875 and 1876, acknowledged its liability for taxes, and waived all claim to exemption under the third section of the act of 1856, which section is contrary to the Constitutions of 1834 and 1870 and the Bill of Rights.

It is further charged that Parker and his associates

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have held themselves out as corporators and stockholders of the Bank of Commerce for eleven years as a corporation, and have exercised corporate powers for that period under the name and style of the Bank of Commerce, and claiming to do so by virtue of the act of 1873, and are estopped now from denying their corporate capacity, and this bill is maintainable against the Bank of Commerce as a corporation, to compel payment of taxes, and it is not entitled to the exemption claimed under the third section of the act of 1856.

The prayer of the bill is, that a decree be rendered against the Bank of Commerce for the taxes specified on the building and lot, and \$150,000 capital stock of the bank, for back taxes for the years 1873 to 1878, inclusive, in favor of complainant, for the use of the creditors of the extinct municipality of the city of Memphis, with interest on the several amounts set out.

To this bill the Bank of Commerce demurred.

The grounds of the demurrer are in substance that the bill shows that the State has recognized from time to time the corporate existence of defendants, which is conclusive on its officers and agents; that upon this bill the court has no jurisdiction to declare the charter forfeited; that a bill for such purpose must be filed as directed by the Code in sections 3409 to 3413, inclusive; that defendants are not liable to pay taxes to the city on its capital stock; and the complainant, receiver, is not a tax collector for the purpose of collecting back taxes; that defendant

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is exempt from paying more than one-half of one per cent. on each share of its capital stock, except for real estate not used exclusively for banking purposes, and for such sums has tendered the amount in its answer to the original bill; the bill shows the grounds of forfeiture therein alleged were waived by the Legislature of the State.

The special chancellor sustained the demurrer, and dismissed the bill, and the complainant has appealed.

The charter was granted February, 1856, under the Constitution of 1834, which (unlike that of 1870) contained no inhibition against granting the exemption it contained. By an act passed November 15, 1859, the "Chattanooga Savings Institution," by which name it was chartered in 1856, was authorized to move its office to Memphis, and in February, 1866, the name was changed to "The Savings Bank of Memphis," and in March, 1873, the name was again changed by the Legislature to "Bank of Commerce," which it still bears. Thus by the successive acts of 1859, 1866 and 1873, the Legislature has recognized the existence of the corporation which it chartered in 1856. The State has not sought by any proceedings instituted for that purpose to have the charter forfeited, nor, as far as disclosed in this record, has it sought to collect taxes off the corporation, except to the extent stipulated in the charter.

The bill alleges that, for certain reasons detailed, the corporation had forfeited its charter. While, for the reasons stated, it might be admitted that the State might, upon a proper proceeding for that purpose,

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have had the forfeiture enforced, a third party cannot, as incidental and collateral to the main objects of this bill, have a decree nullifying the charter creating the corporation. The State granted the charter, and the State only, by the Attorney-General, can institute proceedings to have the franchises of a corporation declared forfeited for failure to comply with the provisions of the charter: 3 Tenn. Ch., 164; 3 Lea, 334; 2 Swan, 333; Code, 3409, *et seq.*; 9 Cold., 423; 12 Heis., 497. And section 1484 of the Code provides that "persons acting as a corporation will be presumed to be legally incorporated until the contrary is shown, and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for the purpose."

While the State, by its Legislature, may change the name of a corporation, and to this extent recognize its then existence as a corporation, it does not thereby assure to it any other or different franchises than those which it is at the time of such recognition entitled to.

The bill charges that there was no organization under the charter; that the naked charter had been sold without more, from the time of the grant until in 1872, when it may be gathered from the charges of the bill that there was an organization to some extent, as it alleges there were stockholders, capital stock, and banking business thereon. But whatever rights were obtained by the "Bank of Commerce," it is alleged, were obtained by purchase of the naked charter, and so of the preceding claimants, up to the

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original grantees. And if any organization was effected under the charter, in was done in 1872 or 1873.

Third persons may not, under our law, enforce the forfeiture of a charter. The State grants it, and may for sufficient cause take it away. But in dealing with such corporations, their powers and obligations may be inquired into. What is the legal effect of the several sales upon the charter originally granted, may be inquired into. The "Bank of Commerce" cannot claim exemption from taxation of its shares of stock and other property, unless it is so exempt by reason of legislative concession to it, of such immunity. If organization had taken place under the original charter, and there had been succession of corporators and change of name, this would not have impaired any right under the original charter: '13 Lea, 407.

But it is charged that Chandler, to whom and his associates the charter was granted in 1859, sold the *charter* without ever having organized, and without any subscription of stock thereunder; that his vendee bequeathed it to his brother, and he sold it to Wicks, and Wicks to Parker in 1873. There seemed to have been, under the allegations of the bill, no transfer of stock or other property, but an attempted transfer of the naked charter; the franchise conferred on certain persons to conduct a banking business, with which was granted immunity from other taxation than that expressly stipulated in the charter.

A franchise is a right or privilege conferred by law. Such a right is not transferrable: Moranetz,

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sec. 536, without the consent of the grantor, and this consent is said to be in reality a grant of authority from the State to the latter association, to which the transfer is made, to exercise the franchises of the former upon the happening of the contingency, viz: the act of transfer. See also sec. 537. Such a grant confers only a personal right on the grantees. The same rules apply as to mortgages of the franchises of corporations: *Ibid*, secs. 538-9. Where franchises conferred on corporations appertain to the use of particular property, every fair presumption will be made in favor of the grant of authority by the Legislature to transfer franchises of this character in connection with the property to which they belong: *Ibid*, sec. 540. The grant of authority to a railroad company to mortgage its property and franchises would refer only to such franchises as pertain to the use of the road, and would not enable the company to mortgage the franchise of being exempt from taxation, in connection with its tangible property: *Ibid*, sec. 541, note 3, 93 U. S., 217. His Honor, the chancellor, held that such power existed in this case under the authority of the *Railroad Company v. Hicks*, 9 Baxt., 442.

The reasoning and argument in that case seems to give support to the conclusion arrived at in this case by the chancellor. But in that case the decision rests upon the ground that the decree of the court directed the sale of *immunities*, rights and privileges appertaining to the charters, and was made in pursuance of an act of the Legislature for the benefit of the State; and that being so, the decrees being

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authorized by the Legislature, were equivalent to a legislative grant, and the purchaser took the franchise with its exemptions.

In a later case, *Ragan & Buffett v. Aiken*, 9 Lea, 614, this Court, Judge Cooper delivering the opinion, said: "The franchise to be a corporation is not the subject of sale and transfer unless by some positive provisions of the statute law, pointing out the mode in which the transfer may be made." See also *Moranetz*, sec. 542, and cases there cited: 112 U. S., 609; 41 Ark., 436. And this is what the bill charges to have been done. If such a transfer is void, of course there can be no grant of immunity or exemption from the payment of taxes.

The chancellor's decree sustaining defendant's demurrer will be reversed and the cause remanded for answer and further proceedings. Defendant will pay the costs of this court.

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THE STATE, for use, etc., in the matter of Minor
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1. **RECEIVER. Trustees. Attorney's fee.** A receiver of an extinct corporation appointed by act of the Legislature with compensation fixed, may employ counsel to defend or bring suits in relation to his duties, and to pay for such services, yet he cannot, under a retainer by himself, charge the fund for legal services performed by himself. The employment of counsel and the payment of proper allowance for such services, when necessary, require the exercise of a sound discretion on the part of receivers or trustees of the fund out of which

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the payment is to be made. It would be as unsafe to allow a receiver or trustee to contract with and pay himself for such services as to allow him to purchase the trust property, which it is his duty to sell at the best advantage.

2. *SAME. Attorney's fees.* While the receiver, under the act appointing him receiver, may not be entitled to payment for his own professional services, the Legislature has the power to provide, by a subsequent act, that such services may be paid for, even though the services may have been performed before the legislative provision.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

W. M. RANDOLPH for complainants.

SMITH & COLLIER and MINOR MERIWETHER for
defendant.

FREEMAN, J., delivered the opinion of the court.

In 1879 the Legislature repealed the charter of the city of Memphis, and among other things "transferred all the indebtedness for taxes, or otherwise, whether in litigation or otherwise, due to said municipality," to the State, to be disposed of as should thereafter be provided by law. All suits then pending were to be finally prosecuted under this act. This act was on its face a general law as to all corporations having 35,000 inhabitants by the Federal census of 1870. Memphis being the only city having this number of inhabitants by that census was the only municipality affected by it. By a subsequent act of the same Legislature it was enacted as to such cor-

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porations or taxing districts, "the Governor of the State shall appoint an officer for such extinct corporations respectively, to be known as 'receiver and back-tax collector,'" who was to take the oath required of other collectors of public revenue, and give bond with sureties, to be approved by the county court in which such extinct corporation was situated. He was to make a statement of his collections to the chancery court.

By section 4 of the act, it was provided "that for the purpose of collecting the revenue embraced in the provisions of the act, the receiver and back-tax collector is empowered and authorized to file a general creditors' bill, in the name of the State, in behalf of all the creditors against all the delinquent taxpayers who owed taxes to the extinct corporation at the time of the repeal or surrender of the charter." Other provisions followed, regulating the details of this suit as to process and other things. All pending suits were to be revived in the name of the State, and consolidated with the general proceeding." The court in this suit was authorized to adjust all "equities, priorities and liens, and to give all relief, both to defendants and creditors, that might be given if there were as many suits as there are creditors and delinquent tax-payers." In a word, the whole pending interests of the repealed corporation and its creditors were to be adjusted in this way by one suit, and the corporation affairs wound up and finally closed.

By the eighth section of the act: "The compensation of the receiver and back-tax collector of the extinct corporation of Memphis is fixed at \$2,000

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per annum," but after two years the county court was authorized to fix the salary, not, however, to exceed this sum. The receiver was authorized to employ an assistant by section 9, "his compensation not to exceed \$100 per month for the time he should be in 'actual service.'" Under these provisions, as was natural and must have been foreseen, an immense crop of litigation sprang up: First, a contest arose in the Federal courts between the receiver and back-tax collector and a receiver appointed by the Federal court at Memphis, as to which should have charge of the administration of the fund. This suit was earnestly contested by Mr. Meriwether, who had been appointed to the office created by the act. It was carried to the Supreme Court of the United States, and there decided in favor of the right of the State officer. Numerous other suits were litigated under the provision we have quoted under the general bill filed as directed by the act, the details of which we need not notice. It suffices to say that Meriwether was an attorney-at-law, and as such gave his services earnestly, and as the record shows, as well as to our own knowledge, most indefatigably, to the prosecution and defense of all these cases. He now files the petitions before us, asking additional compensation for his legal services over and above the salary attached to his office by the act quoted in the *Garrett case*, the one involving the contest between the receivers, among other things.

That Meriwether is an officer, appointed by the Governor, with duties fixed by the law under which he was appointed, is beyond question. That the col-

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lection of the back taxes, involving the adjustment of many matters that would be litigated, as well as the contest of claims of creditors and adjustment of equities growing out of these claims, were part of the duties of the office, is equally clear. The bill provided for was by its express terms to include and involve all this, and this bill the receiver was to file.

The Garrett suit is the only contest not fairly contemplated in the duties assigned him, but the contest there made was eminently a proper one.

While we may assume that the appointment of an officer to an office like this, part of the duties of which are to bring or defend suits, fairly involved the right to employ counsel to perform the legal duties, for which he would be allowed in his settlement all reasonable fees paid, or contracted to be paid, by him, yet quite a different question is presented when such an officer, with a fixed salary, asks compensation for his own services, under a retainer by himself. It is true it was held by this court that where there were three executors, one of whom was a lawyer, who, by agreement, was to attend to the legal duties, that the attorney might in such case be allowed for legal services rendered the estate: *Fulton v. Davidson*, 3 Heis. R., 643. While we do not deem it proper to overrule this case on its facts, it suffices to say that it should not be extended beyond what has been decided by it, and has no application to a case like the one in hand, of a public officer, with duties all defined, and compensation fixed by law for such services.

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The language of Chancellor Walworth, in the matter of the *Bank of Niagara*, 6 Paige R., 215, announces the sound rule in such a case, that case being a receiver of an insolvent bank, appointed by the chancellor. He says: "The receiver was not entitled to charge for extra counsel fees to himself in addition to the legal taxable costs in suits prosecuted or defended by himself as attorney or solicitor, nor was he entitled to any allowance in the character of counsel for himself or his co-receiver in relation to any other matter. The employment of counsel and the payment of proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of the receivers or trustees of the fund out of which the payment for such services is to be made. It would, therefore, be as unsafe to allow a receiver or trustee to contract with and pay himself for such extra services as it would be to allow him to become the purchaser of the trust property, which it is his duty to sell to the best advantage of the estate. If he employs third persons as counsel, and where he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate intrusted to his care will be charged with counsel fees which might safely have been dispensed with." The particular case before us is one in which these words have peculiar force, as it presented a fruitful source of temptation to contests of every kind which it would not be proper to impose upon the receiver. The temptation to earn fees as counsel was liable to

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warp his judgment, and is more than human nature ought to be required to meet in the execution of so important a trust.

This question is, however, disposed of in this case by the act of 1883, entitled an act to amend the former acts on this subject. By section 2 it is enacted, "That section 8 of chapter 92 of act of March 13, 1879, be and the same is hereby so amended as to authorize the chancery court to allow to the receiver and back-tax collector, in addition to his salary as fixed by said section for performing the duties of receiver and back-tax collector, reasonable compensation for such legal services as he may heretofore have rendered, or may hereafter render, in defense of suits against, or prosecution of claims by, such extinct municipality."

This act, no doubt passed at the instance of the receiver, is a legislative construction of more or less weight that such compensation was not deemed proper under the law amended, therefore required a special enactment for the purpose. In view of the evident reasons of policy against allowance of such compensation, we may fairly assume this legislative construction conclusive.

But under this section it is clear, if it be valid, the receiver is entitled to "reasonable compensation for such legal services as he may have rendered, or may thereafter render, in defense of suits against, or prosecution of claims by, such extinct municipality," in addition to his salary, and this allowance is to be made by the chancery court, as required by this act.

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It is argued that this is a retrospective law, and creditors of the extinct corporation have the right to resist it, as impairing or impinging on their vested rights. We see no force in this objection. It is but an allowance made by the Legislature by way of compensation to an officer appointed under its authority for services rendered in securing, protecting and accumulating the fund. As we have said, such compensation might have been allowed if paid to other attorneys employed, and the result would have been the same to the creditors. The only objection to it is based on the impolicy of allowing a party occupying the position of a trustee to employ himself. The Legislature clearly had the right to remove this objection in this case, and has done so, and we do not think any one else can complain.

The claim is for \$2,000 extra compensation in the Garrett case. The chancellor has allowed \$1,200. The proof shows that in all the cases the receiver had the assistance of able and learned counsel, who have been paid. He is to be allowed only for legal services, strictly as such, and not for the incidental duties of his office, such as scrutinizing claims presented, and the like, as claimed in the bill. For all work in his office he has been compensated, and had in addition the services of two assistants part of the time, at all times one, we believe. It is for services rendered in courts, or in the character of an attorney in prosecution or defense of suits, a reasonable compensation is to be allowed.

The testimony of one or two lawyers familiar with

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the services rendered, and of two others, who, from their opinion from examination of the papers in the case, and from the statements of the petition as to what the services were, show the compensation claimed to have been reasonable, in their opinions. The statements of the petition contain much that is not the basis of compensation allowed by the statute, services that were not legal services, such as were intended to be compensated.

We conclude he was, under the act of 1883, entitled to reasonable compensation for such services under the statute cited. We have the testimony of two attorneys who knew the service rendered, who think the \$2,000 claimed is reasonable. But the chancellor, in view of all the facts, with a knowledge of what had been done, taking a broader view of the facts, and no doubt considering the assistance had in the services of other attorneys, has fixed it at \$1,200. We think he was correct. The opinions of the attorneys were no doubt based on the fact of his having done legal service in cases of importance without making allowance for assistance. The witnesses are the men who rendered the main services, and felt some delicacy, no doubt, in estimating the fees of a brother attorney in such a case. We, therefore, adopt the view of the chancellor as to the amount, being based on a more correct estimate of the force of the facts before him.

The result is, the decree is affirmed with costs of this court divided; costs below out of the fund.

We have a petition for re-examination of this case,

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which we would perhaps have done on our own motion. The point on which the re-examination was desirable is, as to whether the Garrett case was a suit against the extinct municipality, so as to be strictly included in the statute. On examination we find it was. It was commenced before the repeal of the charter to enforce collection of judgment debts to a large amount, and by amended bill the suit was prosecuted to reach the assets of the municipality transferred to the receiver. The case is embraced by the act of 1883. We see no reason to change what we have held as to right of Legislature to give proper compensation to an attorney for legal services rendered, after they have been rendered, than before, where the service has been actually rendered.

The petition will be dismissed.

GEORGE R. BOWLING and OLIVIA G. BOWLING v. MEMPHIS & CHARLESTON RAILROAD COMPANY.

CHARGE OF COURT. *Practice.* It is not error for the court to refuse to recall a jury upon request of counsel for a further or additional charge without valid or reasonable grounds being shown.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Bowling v. Railroad Company.

GANTT & PATTERSON for Bowling.

POSTON & POSTON and L. W. HUMES for Railroad Company.

TURNER, J., delivered the opinion of the court.

These actions were brought to recover damages for injuries to persons and property. The principal, if not the only defense, was that the injury resulted from the negligent or unskillful management of a horse in making too short a turn and running the buggy into a gutter and upsetting it. The entire evidence for the company is directed to the attempt to establish such facts. The charge of the circuit judge, as appears in the record, is as follows: "That the plaintiffs' claims were rested on the alleged negligence of defendant; that the common law rules of negligence (which were explained), applied to the cases; that a violation of the city ordinance, if any there had been, might be looked to by the jury as a circumstance; that the burden of proof was on the plaintiffs, and closing with instructions as to the matter of exemplary damages, which was left to the discretion of the jury, in case they had adequate evidence."

The above synopsis is very comprehensive, and as no exception is taken to the charge, we must conclude it was satisfactory to the parties.

After the jury had retired, defendant's counsel requested that it be recalled and the following given: "If the jury find from the evidence that the plaintiff Geo. R. Bowling, drove his horse to within about

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thirty or forty feet of the railroad track, and no nearer, and knowing that his horse was of quick movement, gentle and not frightened at moving railroad trains, and while stopped and standing there, decided to turn back and drive back to Adams street, and being in the middle of High street, he turned his horse directly to the left, made too short a turn, run the wheels of his buggy into the gutter and overturned his buggy, by which he and his sister were thrown out upon the sidewalk and received injuries, then, although the bell was now sounded in approaching the crossing and the flagman did not precede the train and flag the crossing, they will find for the defendant," which was refused.

It is nowhere claimed that his Honor had not already fully charged upon the point suggested in the request, and which, as we have already said, was the sole ground of defense relied upon. The synopsis of the charge is broad enough to have included the matter of request. No grounds are laid for the failure to ask the charge at the proper time. The learned and watchful counsel could not, we think, have overlooked his only hope of successful resistance to a recovery. While it may be proper, in some instances, that a jury should be recalled and further charged, it should always be upon sufficient reasons. It should appear that the party asking such further charge had forgotten, or that the question had occurred to him only since the charge was given and the jury retired.

It would be dangerous to allow the recall of a

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jury for a further or additional charge upon the bare request of counsel without grounds. Under such a rule the ingenious lawyer would always have it in his power to have emphasized to the jury by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions. Under all the circumstances we must presume the jury was fully, fairly and satisfactorily charged. The verdicts are supported by the evidence. We cannot say they are excessive.

Affirmed.

15L 135
16L 737

CHAFIN LIPES and BROWN GAMBLE v. THE STATE.

CRIMINAL LAW. *Evidence of physical peculiarity.* On a question of physical peculiarity of a prisoner, a witness who had recently or immediately examined the prisoner, is competent to testify as to what he had seen. If there be doubt as to the correctness of the testimony of such witness, a physician, if deemed best, under orders of the court, may examine the prisoner.

FROM M'NAIRY.

Appeal in error from the Circuit Court of McNairy county. THOS. P. BATEMAN, J.

A. W. CAMPBELL, A. W. STOVALL and PACE & BRADEN for Lipes and Gamble.

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ATTORNEY-GENERAL LEA and J. W. CHERRY for the State.

FREEMAN, J., delivered the opinion of the court.

The defendants were indicted and tried by the circuit court of McNairy county, charged with an assault with intent to commit murder in the first degree, by shooting one J. A. Barnes, in 1882. They were convicted of the offense as charged, and sentenced to three years in the penitentiary. They appealed to this court. Several errors are assigned in favor of reversal, as to defendant, Lipes. We need notice but one, as it is conclusive of the case.

The shooting was done from a thicket, near a field, where Barnes was mowing at the time. He saw Gamble, as he swears, and fired a pistol, until he had unloaded all the charges at him, after he, himself, was shot, and as he ran off. Tracks in a ditch near the fence, showed that another party was present, and this party barefooted. It was attempted by the State to identify Lipes as the other party, by a peculiarity of the track, and the fact that he had a peculiarity in the shape and length of his toes, corresponding to the track found. The bill of exceptions contains a statement by the presiding judge, Bateman, that at the close of the testimony of the defense, it was first proposed by the defendant's counsel, that Lipes should pull off his shoes and exhibit his feet to the jury, but this was refused on objection by the State. It was then asked, that the court appoint some one to examine the feet of defendant, which the court refused,

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stating as a reason, that "evidence manufactured for the occasion was not competent, and could not be admitted." We gather that his counsel then started to take him out to examine his feet, when the court said, "you need not take the defendant out to examine his feet, for I will not stop the case for evidence to be manufactured, and will not permit such evidence to go before the jury," and required the defendant to come back and go on with the case.

Counsel then said, "we have had some witnesses to examine the defendant's feet," and they proposed to introduce them. The court replied he would not permit that or any other manufactured evidence to go to the jury. The defendant then introduced a party who proved he had just examined the defendant's feet. The State objected to his testifying on the question, and objection sustained. Another witness was presented, who said he had just examined his feet, and he was not allowed to testify. The court, however, said they might introduce any testimony about his feet, provided it was not got up for the occasion, like that he had ruled out.

We think the excellent circuit judge erred in these rulings. On a question of physical peculiarity that could only be proven by persons who had seen the feet of the party, we can see no reason why a party who had recently, or immediately before, seen them, should not be as competent to testify as to what he had seen, as one who had seen them a week or month before, or spoken from memory of how he had seen them when growing up with him, as a bare-

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footed boy. Nor is there any reason seen why the fact might not have been investigated by competent men at any time, and their testimony given to the jury. As a matter of course, the State could rebut by having other parties examine the feet, as a physician, if deemed best, under orders of the court, if any doubt as to the fact, or whether the witnesses had told the truth. An examination in this case in presence of court and jury, would have given the most satisfactory result. But what they might say, was to be judged of and weighed by the jury, and not assumed to be manufactured in advance of hearing the witnesses. The real matter was to ascertain how the fact was, and the best means of ascertaining the truth of the case is what is desirable, if truth, and not mere technical routine, is the object of the law.

For refusal of his Honor to admit the testimony offered, the judgment, as to Lipes, must be reversed, and remanded for a new trial.

As to defendant, Gamble, we see no error of which he can complain in this record. The jury, under a proper charge, have found him guilty. The evidence not only does not preponderate against the verdict, but is largely in favor of the finding. If the jury had found differently, it would certainly not have been in accord with the weight of the testimony. We do not deem it necessary to go into an examination of the testimony to vindicate or sustain this conclusion, but only to state the result of an examination.

Let the judgment be affirmed as to him.

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STANFORD WILLIAMS v. THE STATE.

CRIMINAL LAW. *Jury. Verdict.* Where one of the jurors proposed that each juror should cast a ballot with the number of years he was in favor of written upon it, and the numbers added together and divided by twelve, which was accordingly done, and the result was fifteen years and nine months, and thereupon said juror said it was not customary to return verdicts for fractions of years, and proposed to add on three months, which was agreed to. *Held*, that the verdict was not the deliberate judgment of each juror upon the evidence produced by argument and reflection, but was the result of chance, and a new trial should be granted. It makes no difference that three months were added, as they were added solely because of the statement of a juror that it was not customary to return verdicts for parts of years.

FROM McNAIRY.

Appeal in error from the Circuit Court of McNairy county. THOS. P. BATEMAN, J.

A. W. CAMPBELL and A. W. STOVALL for Williams.

ATTORNEY-GENERAL LEA and J. W. CHERRY for the State.

COOKE, J., delivered the opinion of the Court.

The defendant was convicted of murder in the second degree, and sentenced to the penitentiary for sixteen years. He has filed the record and applied for a writ of error. In support of his motion for a new trial he adduced the affidavits of two of the jurors who tried the case, which disclosed the facts:

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that upon the retirement of the jury, after having received the charge of the court, in their consideration of the case, after they had agreed as to the grade of homicide of which the defendant was guilty, they differed widely as to the term of imprisonment the prisoner should undergo in the penitentiary. Some were for the highest and some for the lowest term, and others stood at different points between the two, when one of the jurors proposed that each juror should cast a ballot with the number of years he was in favor of written upon it, and that the numbers thus ascertained should be added together, and the whole amount to be divided by twelve, which was done accordingly, when the amount thus ascertained proved to be fifteen years and nine months. It was then suggested by one of the jurors that it was not customary to render a verdict for fractions of a year, and proposed that three months be added to the fifteen years and nine months so as to make it sixteen years, which was agreed to by a rising vote, and thus the verdict of sixteen years was arrived at and reported.

In the case of *Crabtree v. The State*, 3 Sneed, 301, which was a conviction for manslaughter, it was held that where it appeared that where the jurors severally stated the number of years which each thought the prisoner should be imprisoned, and dividing the whole by twelve, agreed upon the number thus ascertained as the term of imprisonment, the verdict thus obtained should be set aside and a new trial granted. In that case it was said that "the prisoner as well

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as the State is entitled to the unbiased judgment of the whole as well as every member of the jury as to the amount of punishment to be inflicted for the crime of which the defendant was convicted."

It was further said that the result was not the deliberate judgment of the jury, produced by agreement and reflection, in view of the particular facts of the case before them, but is made to depend upon chance. In *Joyce v. The State*, 7 Baxt., 273, which was also a conviction for manslaughter, where it appeared that the jury being unable to agree on a verdict, one of the jurors made a speech to them, saying "that he had been on criminal juries before, and it was usual, and the custom, for every man to put down on paper what he was for, and then to add the years of imprisonment so put down together, and divide the sum so made by twelve, and return the result as the verdict of the jury." The jury adopted this mode, and made up their verdict accordingly. It was held the verdict was improper, and should have been set aside.

This case falls directly within the principle decided in the cases above cited, and upon their authority the verdict in this case should have been set aside and a new trial granted. We are aware that it has been said in relation to verdicts thus obtained in civil cases, that where there was no agreement in advance that the result thus obtained should be the verdict, but the same was only adopted as an experiment to see what the result would be, and after it was so ascertained the amount was deliberated upon

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and adopted by the jury, or a different amount was upon further consideration adopted, that it would not vitiate the verdict. But in the cases above cited there does not appear to have been any express agreement in advance to adopt the result thus obtained as the verdict, and it is apparent in this case as well as those we have cited that the verdict was obtained by the means thus resorted to, and was not the deliberate judgment of each member of the jury upon the evidence, and produced by argument and reflection, but was the result of chance.

It can make no difference in this case that three months were added to the term thus produced, as the record shows that this was not done upon consideration of the case, and as the result of the deliberation of the jury upon the law and evidence of the case, but was added solely because of the statement of a juror that it was not customary to return verdicts for parts of a year. We are of opinion, therefore, that there is error in the record, and the writ should be granted.

The judgment of the circuit court will be reversed and the cause remanded for another trial. An order will be made upon the keeper of the penitentiary requiring him to surrender the defendant to the sheriff of McNairy county, to be by him safely kept to await his trial according to law.

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LEWIS GLIDEWELL v. THE STATE.

1. **CRIMINAL LAW.** *Jury. Verdict. Not gambling. When.* Where a jury added together the number of years which each thought the prisoner should be confined in the penitentiary, and divided the aggregate by twelve, and the result was agreed upon and returned by the jury, the verdict was not a gambling verdict, there being no agreement or understanding, expressed or implied, before the aggregation and division, that the result should be their verdict. It is the fact of an agreement or understanding before the result is adopted that vitiates the verdict.
2. **SAME.** *New trial. Affidavit. Personal examination.* The court may order a party who has made an affidavit in support of a motion for a new trial, before the court, to be personally examined with respect to the statements in his affidavit.

FROM MADISON.

Appeal in error from the Common Law Court of Madison county. T. C. MUSE, J.

W. W. WILLIAMS for Glidewell.

ATTORNEY-GENERAL LEA for the State.

WILSON, Sp. J., delivered the opinion of the court.

The prisoner was convicted in the common law court of Madison county of the crime of malicious burning, and sentenced to the penitentiary for three years. His motion for a new trial and in arrest of judgment was overruled, and he has appealed to this court.

The indictment is jointly against him and one Robert Meriwether, but there was a severance in the court below, and his case is alone before us.

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The indictment contains two counts. The first charges that the prisoner and Meriwether, on February 1, 1884, in the county of Madison, "unlawfully, feloniously, wilfully and maliciously did set fire to a building containing valuable property, viz: a crib with corn and sorghum therein, the property of F. A. Weatherby," etc. The second, that the said parties on the day and year aforesaid "did wilfully and maliciously burn a barn, the property," etc. No objection was made to the indictment before verdict. After verdict it appears that the prisoner moved for a new trial and "arrest of the verdict," because he was "indicted for arson, and for said offense was convicted and time fixed for three years in State prison, which punishment is lower than allowed by statute, and other causes to be heard on the trial of this motion." It seems that the clerk did enter the return of the jury as a "verdict of guilty of arson," and the judgment of the court was rendered accordingly, the jury having been discharged, as, it appears, over the objection of the prisoner. But in point of fact the jury returned a verdict of "guilty as charged in the indictment;" and upon motion of the attorney-general, the court vacated the judgment based upon the entry of the verdict made by the clerk, had the verdict of the jury as actually returned entered and rendered the proper judgment thereon.

These steps were taken in the presence of the prisoner, and over his objection, and they constitute the first error urged in his behalf.

There is no ground to doubt from this record that

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the jury did in point of fact return the verdict finally acted upon by the court, and we see no reason or principle of law that forbids a court, in criminal trials, from correcting the clerical errors or misprisions of its clerk during the term, so as to make its record speak the truth. To say that it cannot, is to establish a rule that would enable a careless, negligent and designing clerk, in many cases, to falsify the truth and defeat the ends of justice.

We will uphold all technical rules that subserve the honest end of protecting the just rights of prisoners to a fair and impartial trial under the Constitution and the law. We will not enforce trivial ones, not the mandate of the Constitution or of the statutes, which are of use, and can be of use alone to enable the guilty to escape, or to delay the sentence of just punishment.

A question is made here in argument, but not raised by objection of record, that the first count in the indictment is defective as a count for arson, because it alleges simply that the prisoner "set fire to" the property, and fails to allege that the property was burned. In addition to the objection being *dehors* the record, it is irrelevant, because it is not a count for arson, but is obviously based on section 5431 (M. & V. Rev.), and follows its language. This is sufficient.

The next contention is that the verdict should have been set aside, and a new trial granted, because, as is shown by the affidavits of two of the jurors, the jury, in considering of their verdict, differed among themselves

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as to the time the prisoner should be imprisoned, and therefore it was agreed among them that each jurymen should set down the time he was for, and the product of the aggregate divided by twelve was to be accepted and returned as the verdict of the jury, which was done. If the facts were this way, they would clearly, under our authorities, vitiate the verdict, and it should be set aside.

But upon a careful examination of the record, we find the facts to be otherwise, even as detailed by the jurors who give their affidavits. Each juror, it seems, did set down or announce the time or number of years he thought the prisoner ought to be confined, and the result of this aggregate divided by twelve was the verdict agreed upon and returned by the jury. But there was no agreement or understanding, expressed or implied, tacit or otherwise, before this aggregation and division were made, that the result should be their verdict; nor was it in any way to bind the assent or influence the judgment of the individual members of the jury.

And it is the fact of an agreement or understanding, before this method of reaching a result is adopted, or while it is in process of execution, to be bound by its result, and to accept it, that vitiates the verdict. If this be the true test, much less should we be inclined to set aside a verdict, in the absence of an agreement or understanding beforehand to be bound by the result reached under this method, when we can see that the method and its result were not even used as an argument with any member of the jury

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to secure his acquiescence in the result. No authority we have been able to find, certainly none in this State, holds that a verdict is vitiated simply because the jury put down the time each was for confining the prisoner on trial before them, added all of them together, divided the total by twelve, and adopted, after consultation and agreement, the product as their verdict, when there was no agreement or understanding beforehand to do so, and when the method adopted and its result were not used as an argument to influence an unwilling or hesitant member to acquiesce in it. This is the category in which we find this case.

William Glidewell, a brother of the accused, was a witness for the State in the case below. His evidence, in connection with other circumstances proved, was fatally strong against the prisoner. He testified in chief that some five or six months before the burning, his brother, Meriwether and himself had a consultation, in which his brother and Meriwether "said Mr. Weatherby had not paid them, and they were going to have their pay, and the first Saturday night in April was agreed on to meet at Lewis' house to go over to Mr. Weatherby's and have their pay by burning him out." The barn and property in it, some eighty barrels of corn and some fifty or sixty gallons of sorghum, were burned on this night. He further testifies "that the prosecutor offered him fifteen dollars to say that he saw Bob and Lewis set fire to the barn, but did not offer him any thing to give the testimony he had, and that he gave the

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same before the committing court without any inducement or offer from prosecutor or any one."

The prisoner excepted to the testimony of this witness, "because he was an accomplice, and because he was hired." Its admission is assigned as error. We see nothing in the evidence in this record to fix the character of an accomplice upon the witness. The most that can be made out of it in this direction, even inferentially, taking it all to be true, is that he contemplated being one, but backed out of the enterprise before its actual consummation was undertaken. But even if he were an accomplice, we know of no rule of evidence that would exclude his testimony on that ground; and as to his being hired to testify at that time he, in his evidence thus given, relieves it of its purchasable taint, if he is to be believed in what he then said.

But the prisoner presents the affidavit of this same William Glidewell in support of his motion for a new trial. In it he swears that the testimony given by him against the prisoner before the jury on the trial of the case, to the effect that the prisoner and Meriwether made an agreement to burn the barn of Weatherby, as declared in the indictment, was wholly untrue; that no such agreement was ever made: that the prosecutor offered him \$15 to testify against prisoner in this cause; that he paid him \$2 in cash for that purpose a day or so after the trial before the justice of the peace, and that he was a witness against the prisoner because he was paid to be one.

The court, upon the motion of the attorney-general,

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"ruled that the prisoner produce William Glidewell, who is now in easy reach at county jail, in aid of his affidavit," which, as the record recites, he refused to do. It seems that the court did not enforce its rule to this effect, nor did the State's officer take any steps to have him orally or otherwise questioned as to the statements made in his affidavit, and how he came to give it. If it was desirable to have him before the court to ascertain the truth or falsehood of the statements made in his affidavit, or to show, if possible, that his affidavit was "cooked" for the occasion, then the court should have enforced its rule upon the prisoner or his counsel to produce him, or, what was a more direct way to get at the end sought, directed the attorney-general to take out the proper process, and bring him before the court.

There is nothing in the contention of the learned counsel for prisoner that a trial judge has no right or warrant to bring a party who has made an affidavit in support of a motion for a new trial in a criminal case, before the court, to be personally examined therein with respect to the statements made in his affidavit. Courts are created and judges elected to preside over them, in order to ascertain the truth and the right in controversies therein pending, and to administer justice as the same may appear to be adjudged by the law. To this end they have the right to the use of all legitimate sources of evidence calculated to elicit the truth. And to hold that a trial judge, in criminal cases, had no power to bring parties, who make *ex parte* affidavits vitally affecting

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the cause of justice in his court, before him for examination with respect to the statements made by them in such affidavits would be, in many instances, to make him a silent witness of fraud, and the unwilling official promoter of its purposes.

But, however much the affidavit of this witness may smack of suspicion, we cannot ignore it in this record, when we take it in connection with the statement given in his testimony before the jury, in respect to the offer of the prosecutor to pay him fifteen dollars to swear that he saw the prisoner and Meriwether set fire to the barn, when the State takes no step to bring him into open court to be examined in regard to the statements made in his affidavit, when the prosecutor himself, a witness in the case, nowhere and in no way in the record pretends to a denial of the serious inculpatory matter alleged against him by this witness, and when, as is obvious, the testimony given by this witness, afterwards in this affidavit stated by him to have been absolutely and wholly false, and to have been purchased by the prosecutor, carried heavy weight and pointed significance with the jury. While the truth may have been reached by the jury in the cloud of uncertainty and unreliability investing and infesting the testimony of this main witness for the State, as evidenced by this record, the only safe course for us is to award the prisoner a new trial.

The judgment of the court below is therefore reversed, and the cause will be remanded for a new trial.

Steel v. Maness.

THOMAS STEELE v. T. P. MANESS, Administrator, *et al.*

ADMINISTRATION. *Insolvent estate. Chancery jurisdiction.* The administration of an insolvent estate, the assets exceeding a thousand dollars, may by bill be removed to the chancery court, even after publication for creditors to file claims, and the filing of such claims in the county court.

FROM LAUDERDALE.

Appeal from the Chancery Court at Ripley. H.
J. LIVINGSTON, Ch.

W. H. CARROLL for complainant.

W. E. LYNN and GEO. C. PORTER for defendants.

FREEMAN, J., delivered the opinion of the court.

This is an insolvent bill filed in the chancery court of Lauderdale county, by a creditor of said estate. It is charged that the administrator had, before that time, suggested the insolvency of the estate to the county court, that the assets, real and personal, exceeded one thousand dollars in value, with all other allegations specified in the statute for such a bill.

The bill as originally filed was amended by showing that, after the suggestion in the county court, publication had been made for creditors to file claims, and some seven or eight had filed claims with the clerk of the county court for allowance.

The bill was demurred to by several defendants on the ground that, after the publication and filing of

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claims by creditors as stated, the county court first having acquired jurisdiction for the administration of said estate as an insolvent estate, the court of chancery could not then obtain jurisdiction by a bill filed therein, nor could the case be transferred to that court. The chancellor sustained the demurrer and dismissed the bill, from which decree complainant appeals in error to this court.

The action of the chancellor seems to have been based on what he understood to be the ruling of this court in several cases. The first, *Parks v. Gilbert*, 1 Baxt., 97. This case was not a case of an insolvent estate at all, but a sale of land for partition and distribution of the fund among parties entitled, which was sought to be transferred to the chancery court. The case of *Pardue v. West*, 1 Lea, 729, was another case for partition of land. The case of *Rhea v. Meredith*, 6 Lea, 607, 608, might seem to give some countenance to the view of the chancellor. But when the point decided is seen, the only question decided was, whether a bill could be filed to contest the propriety of the action of the county court, in laying off dower and homestead in an insolvent proceeding, and whether the court would permit a transfer of the administration to the chancery court solely for this purpose. The court held it could not be done, and that the county court had complete power over the subject-matter, and the parties had their remedy in that court, and could have made all the questions presented by their bill in that proceeding, if they had chosen to do so. The dower and homestead had already been laid off.

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The provisions of the Code are conclusive on this question. In the chapter entitled, "Administration of Insolvent Estates in the Chancery Court," after providing, (sec. 3209, new Code, 2362, T. & S.), for the administration in the chancery court, when the value of the estate, real and personal, exceeds one thousand dollars, and in following sections what the bill shall set forth, by section 341, new Code, it is enacted: "The bill may be filed at any time after the estate is reported insolvent to the county court, and by the personal representative or any creditor." After giving general directions for the conduct of the suit, section 3226, new Code (2381, T. & S.), is, "upon such bill being filed and sustained, the administration of the estate is transferred from the county to the chancery court, and thereupon the chancellor may enjoin all proceedings in the county court." And by next section, "after such injunction granted, all powers conferred by this article upon the county court and its clerk are hereby conferred upon the chancery court, in addition to the powers granted by this article."

From this it is seen, the administration already commenced and in progress in the county court, is to be transferred to the chancery court, and that court and clerk have no further power to act in such administration, but the powers of said court and clerk are to be exercised by the chancery court.

From this it cannot be questioned, that while concurrent jurisdiction to the extent provided is given the two courts over insolvent estates, when the estate amounts to over one thousand dollars, the administra-

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tion may be transferred to the chancery court, and that court enjoined from further proceeding, at any time before the administration is closed, or, as an administration suit, is still pending in the county court. The case, however, as we have several times held, is transferred to the chancery court in the precise stage of progress it had reached in the county court, and if claims had been uncontested or established after contest in that court, as provided in the chapter regulating administration in that court, they are not required to be proven again, nor can they be reviewed in the chancery court, unless it be on some ground of fraud, or for other equitable causes, such as would open the judgments of any other court having jurisdiction over the subject-matter on which it acts.

We have repeatedly sustained bills in such cases, though the precise question now presented has not probably been raised in any case.

As a matter of course, the court will see that the transfer to the chancery court is *bona fide* sought, and not as a pretext to contest some other question, as in the case in 6 Lea, of dower and homestead, and if it should clearly appear to have been unnecessarily and improperly done from mere litigiousness, the additional cost might be taxed to the party filing the bill. But where the facts required by the statutes we see exist, no ground on which such a bill can be dismissed, simply because the county court has a limited concurrent jurisdiction with the chancery court, in insolvent cases, as provided by our statutes on the subject.

Reverse and remand for further proceedings, with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1885.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAIL-
ROAD COMPANY v. BENJAMIN RUSH.

1. RAILROADS. *Employee.* An action for damages for a personal injury, caused by collision with the moving train of a railroad company, under the provisions of the Code, sec. 1166, *et seq.*, will not lie in behalf of a servant or employe of the company, whose negligence caused, or contributed to cause, the accident or collision occasioning the injury.
2. SAME. *Same. Fellow-servants.* Several employes of a railroad company, although of different grades, when employed in a common service, are fellow servants within the rule that a servant undertakes to run the risk of injuries from the negligence of his fellow servants.
3. SAME. *Same. Same.* An engineer on a moving passenger train, and a brakeman on a freight train, of the same company, at a depot, who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train, are fellow-servants for the purpose of bringing the train safely into the depot.

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4. *SAME. Same. Pleading and practice.* A brakeman employed to give a danger signal, who goes to sleep on the roadway, and is injured by the train he is sent to signal, cannot sue the company for damages under the Code, sec. 1166, *et seq.*

FROM WASHINGTON.

Appeal in error from the Circuit Court of Washington county. NEWTON HACKER, J.

W. M. BAXTER and JNO. ALLISON for Railroad.

S. J. KIRKPATRICK and BROWN & DEADERICK for Rush.

COOPER, J., delivered the opinion of the court.

Action by Rush against the railroad company to recover damages for an injury to his person by one of the company's passenger trains. A demurrer to the declaration was overruled, and upon the trial a verdict and judgment were rendered in favor of the plaintiff below. Upon the company's appeal in error, the Referees report that the demurrer should have been sustained, and the judgment be reversed. Rush excepts.

The declaration originally contained two counts, one basing the right of action on the failure of the company to comply with the requirements of the Code, sec. 1166, and the other on the principle of the common law. The latter count was withdrawn at the trial. The remaining count avers, in substance, that the plaintiff was a brakeman on one of the defendant's freight trains, and as such was ordered by the

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conductor of the train to go along the track of the railroad in an easterly direction from the depot, where the freight train then was, for the purpose of displaying danger signals to one of the defendant's passenger trains then about due from the east; that plaintiff, in pursuance of the order, did go along said track a distance of one-fourth of a mile or more, and placed thereon in a conspicuous manner and place two signal lights, it being in the night time, the one a red light and the other a white light, which, when so placed, could and ought to have been seen by defendant's servants on an approaching locomotive at a distance of at least one-fourth of a mile east thereof; that plaintiff, having so placed said signals, went several yards to the rear or westward thereof, and sat down on said railroad track; that while so sitting plaintiff, overcome by fatigue, fell asleep, in which condition defendant's train, running out of regular time, came upon him at a great rate of speed, and struck him upon the head, body and limbs, inflicting grievous bodily injury, etc.; that notwithstanding said lights so displayed, and notwithstanding plaintiff himself was plainly visible as a person and obstruction on said track, the defendant's servants on the locomotive of the passenger train were not on the lookout, and when said signals and plaintiff appeared, did not sound the alarm whistle, put on the brakes, and employ every means in their power to stop the train and prevent the accident and injury to plaintiff, as required by statute, but neglected so to do.

The causes of demurrer assigned are that the pro-

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visions of the statute do not apply to the state of facts set forth in the declaration, and that plaintiff contributed proximately to his injury by such gross carelessness and negligence as to bar any recovery. So far as the latter cause is concerned, it is clear under our decisions, if the statute applies, that the proximate cause of the plaintiff's injury, upon the facts alleged, would be the negligence of the company's servants in failing to comply with the requirements of the statute, and the plaintiff's contributory negligence would only go in mitigation of damages. The real question is whether the statute applies. And the same question is raised by the judge's charge on the trial, for he expressly told the jury that the statute did apply. The facts brought out on the trial were in substantial accord with the averments of the declaration, but they presented more clearly the gross carelessness of the plaintiff. It was his duty to have taken out torpedoes to place on the track, with a view to notify the servants of the company having charge of the locomotive of the passenger train that there was danger ahead, and further to stand upon the track as the train approached and wave the red light as a signal to stop. Instead of discharging these duties, he neglected them, and went to sleep sitting on the end of a cross-tie, so close to the rail as to be struck by the passing train. His Honor, the trial judge, not only charged that a negligent employee was entitled to the benefit of the statute, but added: "One who becomes the servant of a railroad company undertakes to run all the ordinary

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risks of the service, and this includes the risks of injuries, not only from his own want of skill or care, but likewise the risk of injuries from the negligence of his fellow-servants; but he would not in this be taken to assume the risk of being run over when he might appear as an obstruction out upon the main track, and when the railroad company fails to show that it complied with the statutory precautions and regulations." The demurrer and the judge's charge both, therefore, raise the same question, whether the statute applies to a railroad employe in the regular discharge of his duty. For it may be conceded, for the purposes of this case, that an employe off duty, who is injured on the track by a moving train, might be entitled to stand like an ordinary third person.

The statute, Code, sec. 1166, *et seq.*, provides that when any person, animal or other obstruction appears upon the roadway of a railroad company, "the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident," and every railroad company that fails to observe these precautions, the burden of proof to show compliance being on the company, "shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur." This court has held that the requirements of the statute are mandatory in all cases clearly falling within its provisions, if a compliance with the requirements be possible, although it may appear that their observance would not have prevented

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the accident. But in view of the stringent terms of the act, and the manifest object of the Legislature, the court has not extended its provisions to every case which might be embraced in its general language. We have held that the provisions apply only to the injury of persons or property by actual collision on the roadway proper, and not to the injury of passengers caused by obstruction in the road-bed: *Railroad Company v. McKenna*, 7 Lea, 313; *Railroad Company v. Reidmond*, 11 Lea, 205; *Holder v. Railroad Company*, 11 Lea, 176. They have also been held not to apply to the servants and employes of the railroad company about its depot and yards: *Railroad Company v. Robertson*, 9 Heis., 276; *Haley v. Railroad Company*, 7 Baxt., 239. Nor to a stranger when the company is making up and switching trains within its yard: *Cox v. Railroad Company*, 2 Leg. Rep., 168. And in one of the earliest cases in which these sections of the Code were construed, the court announced as one of its conclusions: "That sections 1166, 1167 and 1168 have reference and application, so far as they relate to actions for damages, to the general public, rather than to the agents and servants employed in the running of trains." And added: "An action will not lie in behalf of an agent or servant of that kind, whose negligence or wilful act caused, or contributed to cause, the accident or collision occasioning him injury": *Railroad Company v. Burke*, 6 Cold., 45.

This last clause, it seems to me, strikes the true note. The statute was intended for the benefit of

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the general public, not for the servants of the company, and clearly not for a servant whose negligence caused, or contributed to cause, the accident. The Legislature surely never intended that a railroad company, by a mere non-compliance with certain precautionary forms, made obligatory as to strangers, whether their observance would have prevented the act or not, should become liable to an employe whose plain dereliction of duty caused the accident. In such a case, to use the language of Judge McFarland in *Railroad Company v. Robertson*, *ut supra*, the liability of the company to its agent for injuries resulting from the misconduct or negligence of that agent, must be determined, not by statute, but by common law principles.

For another reason the statute ought not to apply. We have held, as his Honor the trial judge charged in this case, that an employe of a railroad company, as between him and his employer, undertakes to run all the ordinary risks of the service, and this includes the risk of injuries from the negligence of his fellow servants: *Railway v. Handman*, 13 Lea, 423. Our decisions, as shown by the citations in that case, are that several servants, although of different grades, when employed in a common service, as an engineer and fireman on a locomotive, the foreman of a job and a common laborer working on the job, an engineer and an assistant fireman, are fellow servants. And in *Railroad Company v. Wheless*, 10 Lea, 471, it was held that the engineer is not the superior, but the fellow servant of the brakeman as members of

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the crew of a railroad train. And in *Railroad Company v. Gurley*, 12 Lea, 46, it was taken for granted that the engineer of a passenger train and the yard-master of a depot, whose duty it was to turn the switch by which the train was to take the proper rails to reach its stopping place at the depot, were fellow servants to that end. Precisely for the same reason, the engineer of such a train and the servant employed to swing a danger signal to guide the action of the engineer in coming into a depot, are fellow servants. This is conceded by the trial judge in his charge in this case, but he thinks the statute takes the case out of the rule. But that would make a statute, intended for a different purpose, abrogate a fundamental rule governing the relation of master and servant. It would make an exception to a general rule in favor of a grossly delinquent servant, and give a premium to negligence. The statute does not require, and ought not to receive, such an extension.

The report of the Referees will be confirmed, and the judgment below reversed. The result is that the demurrer to the first count in the declaration is sustained, and, as the second count was withdrawn by the plaintiff, judgment final will be rendered here against plaintiff for costs.

Powell and Wife v. Riley.

E. D. POWELL and WIFE v. A. K. RILEY.

1. **ARBITRATION.** *Award. Evidence.* Under a submission to arbitration, authorizing the arbitrators to hear proof offered by the parties on the questions involved and make their award according to the law and the evidence, the arbitrators are not required to file with their award the evidence on which they acted, nor to reduce the evidence to writing, nor can the parties bring the evidence before the court. The arbitrators are the exclusive judges of the facts which the evidence establishes.
2. **SAME.** *Judges of facts and law.* A submission which does not reserve to the court the power of revision makes the arbitrators the judges of the law as well as the facts, and they need not state the grounds of their decision; but if the arbitrators state the facts in their award and their deduction of law, showing that they intended to be governed by the law, it is for the court to say whether they have drawn proper conclusions.
3. **SAME.** *Exceptions to award.* The exceptions to an award must specifically point out the objection relied on.
4. **PARTITION.** *Heirs. Right of the parties.* Heirs, between whom partition of lands descended has been made, take in severalty the estate allotted, with the rights, privileges and incidents inherently attached to it; and therefore one heir to whom has been allotted the upper part of a farm on a river, through the whole of which farm a ditch for the purpose of drainage had been dug and kept open by the common ancestor, is entitled to have the ditch kept open through the lower allotment of a part of the farm to another heir.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. C.
J. ST. JOHN, Ch.

McDERMOTT & KYLE for complainants.

F. M. FULKERSON, A. D. HUFFMASTER and W.
P. GILLENWATERS for defendant.

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COOPER, J., delivered the opinion of the court.

In the partition of the lands of the estate of their father, made by the county court in 1881, certain land on the Holston river was allotted to the complainant, Mary E., wife of E. D. Powell, and a portion of the same tract immediately below on the river was allotted to the defendant, A. K. Riley. The father during his life had dug and kept open a large ditch through the land constituting the two allotments, parallel to the river, for the purpose of draining the land, which was wet and marshy, and of carrying off the water coming from some springs on the hills above. The defendant partially closed the ditch on his part of the land, thereby impeding the drainage. This bill was filed for the purpose of enjoining the defendant from obstructing the ditch, to settle a boundary between the parties in accordance with their written agreement, and to establish a right of way given by the partition decree to the complainants over the defendant's land. The defendant answered, admitting that he had partially filled the ditch on his land, and that complainants were entitled to a right of way, which he was willing might be laid off by the court. He also expressed his willingness to abide by the boundary line to be settled under the agreement of the parties.

In this situation of the case, the issues raised by the pleadings were, by consent of the parties, in the form of a decree entered in the cause, referred to the arbitrament of three lawyers named, the decision

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of whom, or any two of them, was to be made the decree of the court, unless for good reason it should be set aside and rejected. The arbitrators were authorized, after giving notice of the time and place of hearing, to "hear the proof offered by the parties bearing upon the questions involved, and make their award according to the law and the evidence." The arbitrators heard the proof, upon notice, and made their unanimous award in writing upon the issues raised by the pleadings. The defendant excepted to the report upon the following grounds:

First. The arbitrators failed to file the evidence, if any they had, on which the award is based.

Second. The award is not supported by, or according to, the evidence in the case, as required by the order of reference.

Third. The order of reference required the arbitrators to make their award according to the law, and the same is made contrary to the law.

The chancellor overruled the exceptions, and the motion based thereon to reject the award, and entered a decree in accordance with the award. The defendant appealed.

The submission does not require the arbitrators to file with their award the evidence on which they acted, nor to reduce the evidence to writing. They are merely to "hear the proof offered." And it is obvious that if the court is to act upon the proof, the very object of the arbitration would be annulled, which was to have the decision of judges selected by the parties themselves. It is not only not the duty

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of arbitrators to bring the evidence on which they act before the court, but they are not permitted to do so; nor can the parties, although they stipulate in the submission for the right of appeal: *Bone v. Rice*, 1 Head, 149. The evidence can only be used, when pertinent, to sustain an application, upon some matter *dehors* the award, to set aside the proceedings of the arbitrators on some ground which vitiates their action: *Elliott v. Bass*, 4 Baxt., 354.

The second exception, that the award is not supported by the evidence, is not well taken for the double reason that the evidence is not before us, and that the arbitrators were the exclusive judges of the facts which the evidence established, in the absence of fraud or improper conduct on their part. And there is not the slightest attempt to impeach their integrity or good faith.

The third exception is that the order of reference required the arbitrators to make their award according to law, and the same is made contrary to the law. But the submission makes the arbitrators the judges of the law, as well as of the facts, and does not reserve to the court the power of revision. The arbitrators were not bound to state, and might not have stated, the grounds of their decision, in which event the presumption would be that they had decided according to law. If, however, the arbitrators state the facts in the award, and their deduction of law, showing that they intended to be governed by the law, it is for the court to say, according to our decisions, whether they have drawn the proper conclu-

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sions: *Nance v. Thompson*, 1 Sneed, 321; *State v. Ward*, 9 Heis., 100.

The exception [under consideration is defective in not specifically pointing out the objection to an award embracing several independent particulars: *Elliott v. Bass*, 4 Baxt., 354; *Powell v. Ford*, 4 Lea, 278, 287. The objection made in argument is to the award in the matter of the ditch. The arbitrators, in this part of the award, report the facts to be as hereinbefore set forth. They find that the ditch so dug, used and kept by the father of the complainants and defendant, was in existence and use at the time of said partition; that, since the partition, the complainants have continued to use and keep open the portion of the ditch in their allotment for the purpose of draining the water from the springs, as well as the surface water, which collects on the bottom and on portions of the defendant's land, and carrying it all through the lower section of the ditch, which runs through the defendant's bottom land, and on to the river below; and that defendant also used and kept open his section of the ditch for the same purpose, as well as to drain his own land, until recently, when he filled it up just at and below the division line between the two shares, so as to obstruct the flow of water from the upper section, and throw it back, and cause it to overflow complainants' land above, to their damage and detriment. The arbitrators, upon the facts, decide and award that each of the parties took the land allotted, previously held by them as tenants in common, subject to the rights, privileges and in-

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cidents attached thereto at the time of the partition; that defendant took his share subject to the right of complainant to have said ditch kept open for the purposes for which it has been used for years; that defendant had no right to fill up and obstruct the same as he had done; that the obstruction should be removed and abated, and that defendant should be perpetually enjoined from obstructing and filling it up in any manner.

No argument is submitted on behalf of the defendant to show that the conclusion thus reached is not warranted by the facts. The objection made in the brief of counsel, and sought to be sustained by the affidavits introduced on the motion of the defendant, is that the interference of the ditch with the working of the land, and the five dollars annual cost of keeping the ditch open are burdens on the defendant. It is not shown, however, nor does it appear that the burden will exceed the benefit to the defendant's own land of keeping open the ditch. He was careful to put his obstruction right at the boundary line between him and complainants, and the presumption would seem to be that the residue of the ditch was of benefit to his land, and would be kept open. Be this as it may, and conceding that the ditch is a burden, the real question is whether the complainants were not entitled, upon the facts found by the arbitrators, to the ditch on the defendant's land, and to enjoin him from obstructing it.

"The doctrine is broadly stated," says Mr. Washburne, "that, upon the severance of a heritage by a

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grant of a parcel of it, the grant will, by implication, pass all those continuous and apparent easements which have in fact been used by the owner during the unity of ownership and possession, though they have no legal existence as proper technical easements. And in applying this doctrine, it is competent to show, by parol, what has been used and were in use as appurtenances of the estate at the time of the conveyance": Wash. on Easements, 75, 3rd ed.; *Kenny v. Nichols*, R. I., 411. See also *Brown v. Berry*, 6 Cold., 98. And the doctrine has been applied expressly to ditches dug and used for the benefit of a large body of land subsequently sold off in parcels: *Elliott v. Rhett*, 5 Rich., 405; *Curtis v. Ayroult*, 47 N. Y., 73; *Shaw v. Etheridge*, 3 Jones, 300. And the like rule, for a still stronger reason, has been held to apply in the partition of land among heirs and tenants in common: *Burwell v. Hobson*, 12 Gratt., 322; *Brakely v. Sharp*, 2 Stockt., 206. For tenants in common, who have made partition of their estates, take in severalty the estate allotted with the rights, privileges and incidents inherently attached to it, rather than as grantors and grantees: *Johnson v. Jordan*, 2 Metc., 234.

The chancellor's decree must be affirmed, and the defendant will pay the costs of this court. The costs of the court below will be paid as directed by the chancellor.

Shea v. Donahue.

TIMOTHY SHEA v. JOHN DONAHUE *et al.*

PARTNERSHIP. *Capital.* Under an agreement of partnership for one year, in which it was stipulated that one partner had put in \$1,000 to constitute a common stock to be used in buying goods, etc., and that the other should give his entire personal attention and the benefit of his experience to place against the cash furnished, the partners to bear the expenses and losses jointly, and share the profits equally, the partner who gives his attention and experience is not entitled, upon dissolution, to one-half the cash capital advanced by the other.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W.
B. STALEY, Ch.

J. W. GREEN for complainant.

H. H. TAYLOR for defendants.

COOPER, J., delivered the opinion of the court.

Bill, among other things, for a partnership account between Shea and Donahue. The capital of the partnership business was contributed exclusively by Shea, and the only question raised by the parties is whether Donahue, upon a settlement, is entitled to one-half of the capital thus advanced. The chancellor decided against Donahue, and he has appealed.

The agreement of partnership, entered into March 21, 1877, provided as follows:

"We do hereby agree to become partners as mer-

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chants in making, buying and selling all kinds of tinware, stoves, pumps, etc., in the city of Knoxville, Tennessee, for the term of one year from this date, under the style and firm-name of Shea & Donahue. And to constitute a fund for the purpose, Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stock, to be used and employed between us in buying goods, wares and merchandise. John Donahue, being a practical workman, and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless otherwise mutually agreed between us in writing."

The partnership business was in fact carried on for about three years, the agreement only stipulating for one year. The contention of the defendant is, that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business, and to one-half of the capital advanced by his partner, and this, although it goes without saying, he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to "share the profits equally," not the profits and the capital. And the profits of any business are only what remains after deducting

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debts and expenses, and the capital paid in: *Lindl. on Part.*, 791, 806. The provision that the capital stock shall constitute a common stock to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term, was only intended to restrain the partners from drawing funds from the business so as to trench upon the capital while the partnership continued. There is nothing in the article of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

Of course the articles of a partnership may expressly provide for an equal division of the assets, upon a dissolution, notwithstanding an unequal advance of capitals by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division. For if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal, upon the favorite maxim of chancery, that equality is equity. But, as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, each partner is entitled to his advance before division, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners: *Lindl. on Part.*, 807.

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The only authorities adduced by the learned counsel of the defendants, in support of his contention in this case, are to the effect that property brought into the partnership business by the members of the firm, or bought with the capital advanced becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. "By the capital of a partnership," says Mr. Lindley, "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. . The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreement of the partners, whilst the actual assets of the firm vary from day to day, and include every thing belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital, *e. g.* for money loaned. The amount of each partner's capital ought, therefore, always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where

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the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the share of the whole assets will be treated as equal." Lindl. on Part., 610. The same author adds in another place: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is that losses of capital, like other losses, must be shared equally, but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares": *Id.*, 67. On the contrary, in his chapter devoted to partnership accounts, he expressly tells us that the assets of a partnership should be applied as follows: "1. In paying the debts and liabilities of the firm to non-partners; 2. In paying to each partner rateably what is due from capital; 3. In paying to each partner rateably what is due from the firm to him in respect of capital; 4. And the ultimate residue, if any, will then be divisible as profits between the partners in equal shares, unless the contrary can be shown": *Id.*, 806.

In accordance with these principles, the following decision has been made by the Supreme Court of New York, in a case cited in a note to page 610 of Lindley on Partnership: "Where by the terms of the agreement, the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the

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partnership. He has no interest in any part of the capital excepting so far as in the progress of the business the same may have been converted into profits": *Conroy v. Campbell*, 13 Jones & Sp., 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are *Whitcomb v. Converse*, 22 Am. Rep., 311; *Knight v. Ogden*, 2 Tenn. Ch., 473, and *Shepherd ex parte*, 3 Tenn. Ch., 189. No case has been found to the contrary.

Affirm the chancellor's decree.

J. M. LUCAS v. JAMES BISHOP.

GRANT. *Appurtenances.* The grant of a spring carries the land containing it, including so much of the land as is essential to the enjoyment of the spring in the customary way, but does not include a tree ten feet from the head of the spring on the land of another person, although the roots of the tree extend to, and partially around, the spring, and the branches overhang it.

FROM HANCOCK.

Appeal in error from the Circuit Court of Hancock county. NEWTON HACKER, J.

H. H. INGERSOLL and H. F. COLEMAN for Lucas.

H. T. CAMPBELL for Bishop.

COOPER, J., delivered the opinion of the court.

As this case comes before us by exception to the

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report of the Referees, the action is for trespass to land by "cutting so as to deaden a shade tree from or near a spring." The plaintiff and defendant had purchased together a tract of land from a third person, and afterwards agreed in parol to divide it between them by a particular line. There were two springs in the western half of the land, and it was verbally agreed that the person who drew the eastern half should have one of these springs with a right of way thereto appurtenant to his part of the land. In the division of the land, the eastern half fell to the plaintiff, who took possession of the spring specified, built a fence around it and a spring-house over it. Afterwards the vendor of the land, at the instance of the defendant, conveyed the western moiety to one Zion by deed, reserving the spring, and executed to the plaintiff a bond for the conveyance to him, upon payment of the purchase money, of the eastern moiety, "and to make a deed to a spring on the land I sold to F. Zion, but reserved the same in my deed to him." The tree in controversy was a large elm growing about ten feet from the head of the spring on a steep ledge of soft limestone rock. The soil under the tree, and as far as the shade of the tree extends, is not susceptible of cultivation by reason of the steepness of the land and the rock. The roots of the tree extend down to the spring, and help to form the wall of the spring. They run down nearly all the way on one side, and across the head of the spring, and down a part of the way on the other side. The tree had a heavy top which over-

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hung the spring, and shaded it the larger portion of the time during which the sun shone. The plaintiff offered to prove that the defendant had notched the tree around so as, in the opinion of the witnesses, to make it reasonably certain the tree would die from the cutting. He tendered proof also of the pecuniary damage to the value of the spring which would be occasioned by the death of the tree. The trial judge, upon objection made by the defendant, excluded the testimony "because the tree was not conveyed by the title bond." The result was a verdict and judgment in favor of the defendant. A majority of the Referees report that the judgment should be reversed upon the ground that the evidence was erroneously excluded. The defendant excepts.

The reservation and grant are not of the use of the spring, but of the spring itself, and carry the land which the spring occupies. The grant includes what is reasonably necessary to the enjoyment of the thing granted, and appurtenant thereto: 3 Wash. Real Prop., 336, 340, 3d ed. A thing appendant or appurtenant is defined to be "a thing used with and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." It results, therefore, say the authorities, that land can never be appurtenant to other land, or pass with it as belonging to it: *Id.*, 340.

The grant being of the land containing the spring, which would no doubt include so much of the land as was essential to the enjoyment of the spring in

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the usual mode, would not extend to other land beyond what was reasonably necessary to its use. A tree is, of course, a part of the land on which it grows, although the roots below and the branches above may extend beyond the boundary of the tract. If, therefore, the tree in controversy was not on the land covered by the grant of the spring, it could not be claimed as appendant or appurtenant to the spring, or essential to its enjoyment. The proof does not show that the tree was enclosed by the fence which the plaintiff erected around the spring, nor does the plaintiff claim it as being on his land. The fair inference, on the contrary, is that the damage insisted upon was merely caused by the loss of the shade of the heavy top and overhanging branches. And although the roots of the tree extended to the spring, it is not shown that they were material to the walls of the spring. Nor if they were, is it seen how the fact would give the plaintiff any right to the tree, any more than the existence of a rim of limestone at the spring would give a right to the limestone under the tree. That the shade of a tree may happen to extend to a spring cannot possibly be held to make the tree an appurtenant to the spring, even without the general rule already cited.

The exception to the report must be sustained, and the judgment below affirmed.

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WINNEY MORELOCK v. POLLY BERNARD *et al.*

1. TENANTS IN COMMON. *Chancery pleadings and practice.* If one tenant in common of land is no party to a suit in which the interest of other co-tenants is sold, it is of no consequence to such tenant whether the proceedings are valid, or invalid, and he cannot be heard to impeach them.
2. CHANCERY PLEADINGS AND PRACTICE. *Erroneous decree.* Upon a bill filed by the makers of a trust assignment of land to enjoin a sale under the trust until the correct amount of the secured debt is determined, a final decree without a cross-bill ordering the land to be sold to pay the debt ascertained, is probably of course, and, if not objected to by the complainants at the time, is clearly not void, but at most merely erroneous.
3. TENANTS IN COMMON. *Rights of purchasers from.* If some of the tenants in common convey the whole land by deed in fee, the grantee would take the interest of such tenants in common in the land, and partition would be made accordingly.
4. SAME. *Adverse possession. Limitation.* The exclusive adverse possession of land by one tenant in common, or the exclusive receipt of the rents and profits, without demand made by the other tenants, would be evidence of actual ouster, and will vest title if continued for the length of time prescribed by the statute of limitations.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H.
C. SMITH, Ch.

F. M. FULKERSON for complainant.

MCDERMOTT & KYLE for defendants.

COOPER, J., delivered the opinion of the court.

Ejectment bill to recover land, or an undivided part thereof, and to have partition, with an account

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of waste, rents, etc. The chancellor held that defendant, Polly Bernard, was entitled to three-sixths of the land in controversy, that other defendants owned two-sixths, and that complainant had title to one sixth, ordered a partition, and the taking of proper accounts. The defendant, Polly Bernard, appealed. The Referees have reported that the decree of the chancellor should be affirmed. The appellant has excepted to the report.

Winney Morelock, the complainant, was divorced from her husband, Yancey Morelock, by a decree of the chancery court, and afterwards by a settlement with her late husband and the decree of same court, rendered May 30, 1855, the title to certain lands was divested out of him and vested in her and her children, Henry, Prissy, William, George and Sam, "as tenants in fee and co-parceners in common, to share and share alike." The land consisted, as described in the decree, of three tracts, first, a tract of 108 acres on which complainant resided at the date of the compromise; second, a tract of 158 acres on which the defendant resided; and third, a tract of 75 acres acquired under a distinct title. All of the witnesses who speak on the subject, including the complainant, agree that shortly after the decree vesting title as aforesaid, the land was treated as divided into two tracts, known as the upper and lower place, and that complainant and her two children, Henry and Sam, went into possession of the lower place, and William, Prissy and George, of the upper place, Yancey Morelock, the father and late husband, residing

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with Prissy and her husband. The testimony leaves not a particle of doubt that this division, although only made in parol, was treated by all parties as an equitable partition of the land. Each of the tenants in common acted thenceforward in this view. Prissy and her husband sold before the year 1860, but only by parol, their share of the upper place, treating it as their entire share of the land, to Yancey Morelock. William, a few years after the war, swapped his interest in the upper with Samuel for his interest in the lower place, and Sam shortly afterwards sold the interest thus acquired in the upper place to Yancey and George. William bought Henry's interest in the lower place. These trades were all made without any writing, but were recognized and acted on by the parties, and these facts were known to the complainant, as she admits in her deposition. The result was that for many years the complainant and William have been occupying and claiming the lower place, and Yancey and George occupied and claimed the upper place, paying taxes and receiving the rents and profits.

Sam, the youngest son, committed a criminal offense, and was sent to the penitentiary for a term of years. On July 28, 1869, Yancey, William, George and Prissy, in order to secure the services of one Murrell, in an effort to release Sam from the penitentiary through an executive pardon, joined in a deed conveying by certain boundaries 243 acres of the land in trust to secure a note to Murrell for \$500. A pardon was secured by Murrell, and Sam was released from the

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penitentiary. Afterwards, the makers of the deed of trust filed a bill against Murrell to reduce the amount of his claim for compensation below the sum called for by the note, and such proceedings were had that, by a final decree, the sum was reduced to \$275, for the payment of which the land was ordered to be sold, and was sold. The sale was confirmed by decree of May 3, 1875, divesting the title to the land described in the deed of trust out of the grantors and vesting it in the purchaser, Kyle, in fee, subject to redemption. The land was redeemed by one McDermott, who was put in possession under the order of the court on June 4, 1878. McDermott and Kyle had previously joined in conveying the land to the defendant, Polly Bernard, who was at once put in possession, and has since been in possession claiming the land as her own. The deed of trust purported to convey the land in fee as the absolute property of the grantors, with covenants of seizin, general warranty, right to convey and against encumbrances.

The original bill in this cause was filed December 4, 1878, by Yancey and Winney Morelock, and sought in effect to set up an agreement with Kyle and McDermott to extend the time of redemption of the land under the foreclosure sale. This bill was, upon demurrer, dismissed by the chancellor, who afterwards, during the term, gave leave to Winney Morelock to file an amended bill. The amended bill was, accordingly, filed June 7, 1879, against Polly Bernard, William, George, Sam and Prissy, the children of complainant, the husband of Prissy, and the children

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of Henry Morelock, a son of the complainant who had died. Sam and the children of Henry were made defendants as non-residents of the State. None of these defendants, except Polly Bernard, ever entered appearance or filed an answer, and no publication seems ever to have been made for the non-residents.

The bill seeks to impeach the title of the defendant, Polly Bernard, to the land in controversy upon the ground that the foreclosure decree under which she claims was void. But it can be a matter of no consequence to the complainant and her rights whether the decree in question was valid or invalid. For, if valid the sale thereunder would not affect her interest in the land, she being no party to the proceedings; and, if invalid, the decree confirming the sale would be, even if void, a sufficient assurance of title to enable the defendant to connect her possession of the land with the possession of those persons whose titles were thereby divested out of them and vested in her. In either view the question would still be whether the titles of those persons were perfected or protected by the statute of limitations.

The objection to the validity of the decree is that it was made without being asked for in the bill, and without any cross-bill. The bill was filed to enjoin a sale under the trust deed until the true amount of the secured debt was ascertained. The grantors, trustee and beneficiary were before the court, and we are not prepared to say that it would not have been of course, after the debt was ascertained, to foreclose the

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trust, even over the objection of the complainants, upon the well recognized rule of equity, that when the court has jurisdiction for one purpose it will exercise it for all purposes, so as to prevent further litigation. Be this as it may, we are certain that the exercise of the jurisdiction in such a case without objection, the court having before it the parties and the subject-matter, would at most only be erroneous, and therefore voidable and not void. The parties have acquiesced in the decree and sale, and do not now seek to impeach it in this suit. And the complainant cannot be heard to do so.

It is suggested also that the court improperly declared a lien in favor of the counsel of the complainants in that case for their fees. But the lien was declared on the land or the surplus proceeds of sale, and the record of the case shows that the sale was made under the decree of foreclosure for the trust debt, and the lawyers' fees, with the assent of the clients, paid out of the surplus proceeds of sale. The complainant has no interest in the matter.

In the case now before us, the decree of the chancellor, the report of the Referees, and the argument of the complainant's counsel assume that the trust deed, the decree of foreclosure and sale thereunder cover all the land settled upon Winney Morelock and her children. In this view the chancellor and the Referees hold that the defendant, Polly Bernard, is entitled to three-sixths or one-half of the land. The complainant has not excepted to the finding of the Referees. The result would be that the defendant

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would be entitled to have allotted to her in a partition of the land one-half of the whole in quality and quantity, and the court, upon an obvious principle of equity which we have repeatedly recognized, would order that this half should be so laid off, if possible, as to include the land actually purchased and occupied by her. And inasmuch as the proof leaves little doubt that the upper place occupied by the defendant is about equal in value to the lower place occupied by the complainant, the parties would in all probability stand in *statu quo ante bellum*.

But the decree in the divorce suit vests the complainant with the title to land described as containing 341 acres, and the trust deed conveys land described as containing only 243 acres. And every single witness in this suit, who deposes on the subject, recognizes the existence of an upper and a lower place, occupied as hereinbefore mentioned, and that the trust deed covers the land known as the upper place. There cannot be a particle of doubt that the possession of the defendant, Bernard, and those under whom she claims has never interfered with the possession of the complainant of the lower place. The complainant herself, in her deposition, distinctly recognizes the separation of the two places. "Henry, Sam and myself," she says, "were to work on the lower place, and the other three on the upper place." To the question, who claims to own the lower place? she answers: "William has the management of it, but I claim it while I live." She concedes the occupation of these places by her several children and her late

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husband, as hereinbefore set forth, first under the verbal partition, and afterwards under the various trades made by them, of which she admits she had knowledge by hearing the parties talk about them, and set up their respective claims. The proof is all to the effect that Yancey and George, for at least ten years, and probably fifteen years before the commencement of this suit and the execution of the writ of possession of the foreclosure suit, had been in the actual, exclusive and adverse possession of the land in controversy, claiming it as their own under the various parol trades, receiving the entire rents and profits, and paying taxes. These facts are virtually admitted by the complainant in her deposition, and proved by the other witnesses. And by their deed of trust of July 28, 1869, the grantors undertake to convey the land in controversy absolutely by metes and bounds. Such a conveyance is necessarily the assumption of entire ownership, and adverse to the right and title of a co-tenant, if any. Possession under such a deed for a sufficient length of time would give title under the statute of limitations: *Waterhouse v. Martin*, Peck, 392. And notice of such a claim of title, in the absence of qualifying facts, would be notice of adverse claim. The complainant manifestly had knowledge of the trust deed, for she says that the children wanted to sell a part of the land to pay off the Murrell debt, and she told them they might do so, and she would make a right to it. The facts deposed to by all the witnesses leave no doubt that the possession of

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Yancey and George Morelock was exclusive and adverse to their co-tenants.

Yancey Morelock does testify, however, that he never set up any claim while on the land "in opposition to Winney Morelock's right." He had previously testified that he had bought Prissy's interest in the upper place and always claimed it. George Morelock also testifies that he did not hold in opposition to his mother. The general character of both of these witnesses is impeached and not sustained. The complainant also testifies that Yancey and George "never held the land from her, nor tried to; I never heard that they did." But this, and other testimony inconsistent with the facts admitted by the witnesses themselves, should be read in the light of the complainant's claim to the land as set up in her deposition. She is asked: "Do you claim that you have entire control of all the land (both places) decreed to you and the children, and that they are only entitled to it after your death?" Her answer is: "I do claim that, and always did claim it." The witnesses might well say that they never held in opposition to such a claim, for the claim was without any foundation. And no doubt they have resorted to some such pretext as an excuse for their language. If they are to be understood as saying, without mental reservation, that they never held the land adversely to the complainant as their co-tenant, the statement is in direct conflict with the facts deposed by them, as well as the other witnesses, and palpably untrue.

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It is conceded by the Referees, and the eminent counsel of the complainant, that exclusive adverse possession of a tract of land by one tenant in-common, or the exclusive receipt of the rents and profits, no demand being made by the other tenants, would be evidence of actual ouster, and would vest title if continued long enough: *Hubbard v. Ward*, 1 Sneed, 279; *Saunders v. Hackney*, 10 Lea, 203; *Coal Creek Mining and Manufacturing Company v. Ross*, 12 Lea, 10. And we are clearly of opinion that such exclusive adverse possession has existed in this case for a length of time sufficient to vest the title in the defendant, Polly Bernard, and in the defendants, Yancey and George Morelock, under whom she claims, and to perfect her title to the land in controversy.

The exceptions to the report of the Referees will be sustained, the chancellor's decree reversed, and the bill dismissed with costs.

Millner v. The State.

CAPTAIN MILLNER v. THE STATE.

CRIMINAL LAW. *Larceny*. An indictment is sufficient, which, in the usual form of an indictment for larceny, charges the defendant with stealing "one railroad ticket from Knoxville, Tennessee, to Washington, D. C., of the value of seventeen dollars," the property of the prosecutor.

FROM KNOX.

Appeal from the Criminal Court of Knox county.
M. L. HALL, J.

S. G. HEISKELL for Millner.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

Millner was indicted and convicted of stealing "one railroad ticket from Knoxville, Tennessee, to Washington, D. C., of the value of seventeen dollars." The trial judge charged that a railroad ticket as such was personal property, and the subject of larceny. The prisoner, after conviction, moved in arrest of judgment upon the following grounds: That a railroad ticket is not the subject of larceny at common law, that the description of the ticket stolen in the indictment is not sufficient, and that the indictment is not drawn under the Code, section 4693, there being no statute in this State making the stealing of a railroad ticket, as such, larceny. Error is assigned on the charge, and in the failure of the trial court to arrest the judgment.

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By the Code, section 4693, it is made a penitentiary offense to feloniously steal, among other things, "any instrument or writing whereby any demand right or obligation is created, ascertained, increased, extinguished or diminished, or any other valuable writing." It is conceded that the stealing of a railroad ticket would be indictable under this section, but the contention is that the indictment in this case falls short of the requirements of the law.

At common law larceny could not be committed by taking and carrying away a mere evidence of debt, even if it were a bank note passing as money, the reason being that the taker would not thereby get either the money due, or the right to receive it. This exception has been abrogated everywhere by statute, and in this State by the provision of the Code cited. Any instrument or writing, therefore, of value falling within the statute would be the subject of larceny. An indictment in the common law form for larceny, sufficiently describing the instrument or writing, would be good, as provided by the Code, section 5119. Or the indictment will be good if it contain a statement of facts constituting the offense in ordinary and concise language, without prolixity or repetition, even where the common law prescribes particular and technical language to describe the offense: Code, secs. 5114, 5120; *State v. Swafford*, 3 Lea, 162; *Wedge v. State*, 7 Lea, 687. Accordingly, an indictment for stealing "ten five dollar bank bills," without more, has been held sufficient: *Ryland v. State*, 4 Sneed, 357; *State v. Hall*, 2 Leg. Rep., 105. It was said

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at an early day in this State that a degree of precision in the description of an offense cannot be given in an indictment so as to distinguish it *per se* from all other cases of a similar nature. Such a discrimination amounting to identification must rest in averment, and its absence in description can be no test of the certainty required, either for defense against the present, or protection against a future prosecution: *State v. Pearce*, Peck, 66. It was accordingly held in that case, under a statute for maliciously killing beasts, that the indictment was good which described the animal killed, as "one horse beast of the value," etc. The language of the indictment, under our statute, need only be "the ordinary language to express the fact intended": Per Freeman, J., in *State v. Hall*, 2 Leg. Rep., 105. And consequently an indictment was sustained in that case which charged the defendant with stealing "one five dollar and ten five dollar bills," these words fairly implying bills of these denominations passing current as money. So a charge of stealing two hams, etc., has been held good: *Taylor v. State*, 3 Heis., 460. And in counterfeiting, describing the coin by its denomination is sufficient: *Peck v. State*, 2 Hum., 78.

A railroad ticket, which authorizes the holder to travel, without other charge therefor, on the trains of a railroad company, or a series of railroad companies connected with each other, between distant points, is undoubtedly a valuable writing or instrument under our statute, and the personal property of the rightful owner. An indictment for the larceny of such a ticket

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in the common law form, describing the ticket in ordinary and concise language, would be good. We know as matter of daily occurrence and current history that tickets are sold, in this great country, entitling the holder to cross the continent, from ocean to ocean, by connecting roads, and to pass from the extreme north to the extreme south. Such a ticket may be stolen at any point of the route, and the holder may not know, or may have forgotten by what company it was issued, or the precise line it entitled him to take. The statute intended to punish the stealing of such a ticket, and, in analogy to the settled rule as to bank bills and legal coin, as well as is in virtue of the provisions of the Code and the general principles of our decisions, a description of such a ticket in ordinary language, and in the words of the indictment before us, is sufficient.

Affirm the judgment.

J. M. ANDERSON *et al.* v. J. D. AKARD *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Lost deed.* Under a bill filed to set up a lost deed, if the evidence clearly establish the proximate date of the deed, the names of the grantor and grantee, the signing of the deed by the grantor and its delivery to the grantee, and that the conveyance was of forty acres of a designated end of a seventy-five acre grant, the complainant would be entitled to have the deed set up, and title divested and vested accordingly, even if the precise metes and bounds set out in the original deed could not be ascertained.

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2. **SAME.** *Same. Boundaries.* And if the proof shows in addition that the boundaries of the land were pointed out by the grantor by the calls of the grant, beginning at a particular tree on one side of the tract, and running around to a particular tree on the other side, closing the boundaries by a straight line from one of these trees to the other, and that these boundaries were included in the deed, the boundaries of the grant by actual survey between the designated trees, and a straight line from one to the other, may properly be embodied in the deed, although the witnesses present at the making of the deed cannot recollect the poles and bearings actually called for in the lost deed.
3. **SAME.** *Same.* Any person having a legal or equitable interest in land, however small, whose possession is endangered by suit, and even without suit, may come into equity to set up a deed lost before registration, by bringing before the court all persons having an interest in the land, and the title of the complainant in such a bill may be confirmed by deed of confirmation made after the filing of the bill, or by acquiescence in his claim.
4. **SAME.** *Same. Limitation.* Neither the statutes of limitations, nor lapse of time have any application to a bill filed to set up a lost deed by a person in possession of the land conveyed therein.

FROM UNICOL.

Appeal from the Chancery Court at Ervin. H. C. SMITH, Ch.

N. M. TAYLOR and C. J. ST. JOHN for complainants.

REEVES & CARR for defendants.

COOPER, J., delivered the opinion of the court.

Bill to set up a deed to land alleged to have been made by William Peoples to Absalom McNabb, and to have been unintentionally lost, and to perpetually enjoin the heirs of William Peoples from prosecuting a suit for the recovery of the land. The chancellor

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grants the relief sought, and the Referees report that his decree should be affirmed. The heirs except.

The land consists of about forty acres of a seventy-five acre grant held by Peoples, the part of the granted land claimed lying immediately adjoining the land on which McNabb lived, and which belonged to his mother. The proof is entirely conclusive that about the year 1850, William Peoples sold to Absalom McNabb about forty acres of the granted land nearest to him, for a full consideration paid, and executed to him a deed, or as the learned counsel of the heirs concedes, "a writing of some character," intended as a conveyance, and attested by two witnesses. The instrument was never registered. The proof shows that shortly after the sale the forty acres were assessed to McNabb, and continued to be assessed to him, he paying the taxes, and William Peoples only gave in for taxation the residue of the land included in the grant. The evidence is that McNabb claimed the land thereafter, and so far as appears William Peoples never did claim it. Peoples died June 30, 1875. McNabb died in the fall of 1867, leaving a widow and several children. After McNabb's death, the forty acres were assessed to his widow, who paid the taxes. The taxes for the year 1877 not having been promptly paid, the land was sold therefor in 1878, and bought by W. J. Peoples, a son of William Peoples, and one of the defendants, who afterwards permitted the widow to redeem the land. The land was also sold in the lifetime of Absalom McNabb, under an execution against him, and bought by the creditor, who after-

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wards received from McNabb the greater part of the debt, and made a gift of the small residue to the widow. The written instrument from Peoples to McNabb was by the widow placed in the hands of the complainant, who was her brother-in-law, to be registered. He placed it in his clock, where it remained for some time, and was lost when the clock was repaired, and, after diligent search, has never been found. Feeling that he was to blame for the loss, the complainant bought the land from the widow, and took from her a deed of conveyance, dated May 3, 1880, which deed was also signed by one of her daughters, whose name was not mentioned in the body of the deed. Previously, and with a view to this conveyance, the complainant had the land run out by the county surveyor in the presence of the defendants, W. J. and M. T. Peoples, sons of William Peoples, who owned, under a conveyance from their father, over nine hundred acres of land adjoining a part of the land covered by the seventy-five acre grant. The complainant and the surveyor say that this survey was made in the year 1877, and that the Peoples made no objection to the survey. The two Peoples say that the survey was made after they were notified of the loss of the deed, which they admit was not earlier than 1880, and that they did object to the survey. No part of the land in controversy has ever been enclosed. The McNabbs have cut wood from it, and sold wood thereon to be cut by others. The two Peoples above named say they have also cut wood on both sides of the line claimed by the McNabbs

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as the dividing line. There is no other proof of such cutting, and it does not appear that they crossed the line intentionally. Several witnesses depose to having read the deed sought to be set up, and state positively that it was a conveyance by William Peoples to Absalom McNabb of about forty acres of the grant nearest to the place on which McNabb then resided.

Under these circumstances, the heirs of William Peoples do not except to so much of the report of the Referees as finds that there was a deed executed by their ancestor to Absalom McNabb for some of the land included in the seventy-five acre grant, and that the deed has been lost. What they do insist upon, in their first and second exceptions, is that the Referees, by their finding of the fact that the deed had been executed, were brought directly to the position which they, the heirs, had contended for, and have not decided it, namely, that the contents of the deed were not sufficiently described to be set up, and that the proof fails to show that such a deed as the chancellor set up was in fact executed, being too vague and indefinite for that purpose. The evidence does clearly establish the proximate date of the deed, the names of the grantor and grantee, the consideration, the signature of the grantor, the delivery of the deed by the grantor to the grantee, and that the conveyance was of forty acres, more or less, of the seventy-five acre grant adjoining the McNabb land. The only uncertainty can be as to the exact boundaries given in the deed set up.

The proof shows that the land covered by the

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seventy-five-acre grant lies in such a shape that forty acres adjoining the McNabb land can be very easily laid off by running a line across the land from the boundary on one side of the grant to the boundary on the other. In this way the proper quantity of land could be readily obtained from the general description, about which there can be no dispute. Even if the contention made by the exceptions should be sustained, the complainants would still be entitled to have the deed set up according to the general description, and the result would be substantially the same attained by the chancellor's decree: *Hord v. Baugh*, 7 Hum., 576.

But we think the testimony sufficiently establishes the boundaries as claimed in the bill and fixed by the decree. Jonathan McNabb, who is clearly proved to have been an attesting witness to the deed, although he himself is not absolutely certain of the fact, and only believes that he was, testifies that he was present when Wm. Peoples traded the land to Absalom McNabb; that Peoples, McNabb and himself went around the land, and Peoples laid off the boundaries; that Peoples then wrote a deed for the land at McNabb's house, signed it, and it was witnessed by Andrew McNabb, and to the best of his belief by himself also; and that Peoples delivered the deed to McNabb. Peoples, he adds, had with him a deed for the whole land, meaning, no doubt, the grant. He went around the boundary of the land, meaning plainly the boundaries of the grant, by the calls of the deed, pointing out the lines and corners. The new line, dividing the

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land of the grant, was only a short one: it ran from the beginning corner to an oak on Price's line. The witness was one of the chain-bearers when the land was run out in the presence of complainant, Anderson, and the two Peoples, as above mentioned. "In running the land, he says, "we began at a marked poplar, then we followed the line of marked trees to a white oak, a marked tree, a straight line from the white oak to the poplar, the beginning corner, includes the land in controversy. The boundaries set forth in the deed from Hannah McNabb (the widow of Absalom McNabb) to the complainant, Anderson, include the land in controversy."

The substance of this testimony is that William Peoples, when he sold the land, went around the lines of the end of the granted land sold, thus designating the boundaries of the forty acres, beginning at a white oak on one side and ending at a poplar on the other side, then closing the boundaries by a straight line between the poplar and the oak, drawing up the deed accordingly. These lines were again surveyed by following the calls of the grant, in the presence of M. T. and J. W. Peoples, in order to prepare the deed from Hannah McNabb to Anderson. The Peoples themselves testify that the poplar and oak are well known corners of the grant, and that a straight line between them would run on a ridge. The only line not taken from the grant is this straight line, which, it is obvious, would not require a survey. The boundaries thus pointed out by Peoples were included in the deed, and admit of no doubt. There is, con-

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sequently, no uncertainty whatever in the boundaries. The criticism of counsel is that the witness calls for an oak on Price's line, whereas Price's line is at the north end of the grant, not on the eastern side. But if the witness is mistaken as to Price's line, he is not mistaken as to the oak, a well known corner of the grant, pointed out by the defendants themselves. So they insist upon the statement of the witness that he does not know that the poles and bearings are correctly stated in the bill, but they are found by the surveyor to be in accordance with the grant, and the defendants have introduced no evidence to the contrary. The witness testifies that the deed described the land by the boundaries of the grant as just pointed out by the grantor. Even if the language of the deed as set up be not exactly the same as the wording of the lost deed, there cannot be a doubt of the substantial identity of the boundaries, and substance is all that can be expected in such cases.

Another witness, who read the lost deed twice, describes the boundaries substantially in the same way, by proving that the dividing line ran from the poplar to the oak, the other boundaries following the calls of the grant. Another witness says he thinks he heard Absalom McNabb and William Peoples speak of the poplar and oak as corners on the land, but will not be positive. Other witnesses, who had read the deed, speak generally of its covering the land included in the boundaries mentioned in the bill. We think the evidence is ample to establish the instrument as set up by the chancellor.

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The third exception to the report of the Referees is that the complainants had no title to the land at the time of filing the bill, and therefore no right to file such a bill. The fourth exception is that the complainant, Anderson, did not acquire the title of Nancy McNabb, the daughter of Absalom McNabb, who signed her mother's deed to the complainant, by the mere act of signing, and that the subsequent deed of quit-claim or confirmation, executed by the other children of Absalom McNabb to the complainant, Anderson, did not carry the title of two married daughters, there being no privy examination. At the filing of the bill, Anderson held the land only under the deed of the widow of Absalom McNabb, which deed was signed also by one of her daughters, whose name and interest in the land were not mentioned in the body of the deed. After the filing of the bill all of the other children of Absalom McNabb joined in a quit-claim deed of the land to Anderson, confirming his title. The objection is that the titles of three of the daughters did not pass by these conveyances, and that the subsequent deed would not relate back to the filing of the bill.

The loss of a title deed was not always a ground to come into a court of equity for relief; for if there was no more in the case, although the party might be entitled to a discovery of the original existence and validity of the deed, courts of law might afford such relief, since they would admit evidence of the loss of a deed just as a court of equity would do, and, upon proof of such loss, secondary evidence

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of the contents of the deed, and, if necessary, of its validity also, was admissible at law: *Whitfield v. Fausset*, 1 Ves., 392. To enable the party, in case of a lost title deed, to come into equity for relief, he must have established that there was no remedy at law at all, or no remedy which was adequate and adapted to the circumstances of the case. If the deed was lost, and the party in possession prayed discovery and to be secured in his possession under it, the jurisdiction of equity would be clear, for no remedy in such a case lay at law: *Dalston v. Coatsworth*, 1 P. W., 731. And so this court has held that the loss of a deed to land before registration entitles a party to have the deed set up in equity: *Hord v. Baugh*, 7 Hum., 576. For the same reason that there is no remedy at law, a person having only an equity in land, or a right to call for the title, would be entitled to the same relief. And obviously, the extent of the interest or equity of such person in the land would not affect the right. All that equity would require him to do would be to bring all the parties interested in the title before the court, so as to prevent a multiplicity of suits. And that is what the complainant, Anderson, has done in this case. He has joined with himself as co-complainant the person to whom he had contracted to sell the land, and he has made the widow and children of Absalom McNabb defendants, as well as the heirs of William Peoples. The children of Absalom McNabb seem to have surrendered the land in controversy to their mother, recognizing her right by long acquiescence, and by

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their deed of confirmation, executed since the filing of the bill. She had at least a right of dower in the land which she could sell: *Daly v. Willis*, 5 Lea, 100. And the complainant, Anderson, also obtained by her deed whatever equity she may have acquired by the consent of her children. The signature of one of her daughters to that deed, although it may not have passed her title, might operate by way of estoppel to prevent her from disputing the title: *Berrigan v. Fleming*, 2 Lea, 271; *Friedenwald v. Mullan*, 10 Heis., 226. And the deed of the other children of Absalom McNabb might operate by way of confirmation, notwithstanding its words of positive grant, especially as it expressly purports to confirm the grantee's title: *Brien v. O'Shaughnessy*, 3 Lea, 724; *Augusta Manufacturing Company v. Vertrees*, 4 Lea, 75, 83. And the same result might have followed their tacit recognition of the complainant's title by allowing the bill to be taken for confessed against them.

The next exception to the report of the Referees is that certain deeds and other exhibits to the bill and depositions were improperly admitted in evidence over the objections of the Peoples heirs. The bill of exceptions shows that the heirs did except to these exhibits "as being incompetent to be introduced and received as testimony." The exception, as we have repeatedly held, is too general. It should have specified the ground of incompetency, for it might have been such as could easily have been supplied: *Ingram v. Smith*, 1 Head, 411; *Garner v. State*, 5 Lea, 21;

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Miller v. State, 12 Lea, 223. The Peoples heirs in this case occupy such a position as to entitle them only to the strict law.

The last exception to the report of the Referees is that they should have sustained the defense of the statute of limitations set up by the heirs. The statute relied on is that which limits the right of action against heirs for a debt, contract or liability of the ancestor to seven years from his death: Code, secs. 2281, 2786. The argument is that the right of action accrued at the time when the deed was lost, and that the loss occurred in the lifetime of William Peoples. The weight of testimony is, perhaps, in favor of this contention of fact, but there is evidence tending to show that the loss occurred after the ancestor's death. Be this as it may, the suit is not for the recovery of land, or the enforcement of a debt, contract or liability of the ancestor. It is simply the assertion of an equitable remedy which the party is entitled to resort to at any time when the exigency may arise. The proof leaves no doubt that the complainant, and those under whom he claims, have been using the land in the only mode in which, in its condition, it could be used, without any adverse user. The proof of the heirs does not establish any use of the timber on the land openly adverse to the claims of the McNabbs. And if it did, the possession of the McNabbs would sustain their right, if they had the legal title. Their right to set up their lost deed is one of those continuing equities, they being in legal possession, and holding against any adverse claim, of

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which we have several cases in our books, where the statutes of limitations have no application. "Neither the statutes of limitations," this court has said, "nor lapse of time have any application to a bill in chancery, in which the complainant is not seeking to recover any thing, but only resisting the demand of the defendants which they have been constantly opposing: *Lewis v. Brooks*, 6 Yer., 167; *Kirtland v. Railroad Company*, 4 Lea, 414, 418; *Caldwell v. Palmer*, 6 Lea, 652.

Confirm report and affirm decree, with costs.

 SAMUEL N. KELLEY v. ELIZA KELLEY *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Administrator*. A bill filed by a creditor of an estate to compel the collection of a debt due to the estate secured by a vendor's lien on land sold by the deceased, is not a bill to sell realty descended, but to collect a personal asset endangered by the negligence or collusive conduct of the administrator.
2. SAME. *Administrator. Heir*. The heir, upon whom has descended the naked legal title to the land sold by his ancestor, holds the title in trust for the vendee and the administrator, and may properly be divested of that title as soon as the purchase-money debt is ascertained to the satisfaction of the administrator, or so as to be conclusively binding on him, and the land sold in satisfaction thereof.
3. SAME. *Infant. Guardian ad litem*. It is irregular to take any step in a cause wherein there is an infant defendant until a guardian *ad litem* has been appointed, but the irregularity will be cured, so

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as not even to be error on appeal, if no binding decree is rendered until the infant is properly represented, and the guardian, having the opportunity to object, acquiesces in what has been done, and the court makes a correct decree on the case then presented.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W.
B. STALEY, Ch.

W. P. WASHBURN for complainant.

A. S. PROSSER for defendants.

COOPER, J., delivered the opinion of the court.

Writ of error sued out by an infant defendant after coming of age. The Referees recommend a reversal of the decree. Both parties have excepted, so as to open the whole case.

The bill was filed April 22, 1870, by Samuel N. Kelley, as a creditor of the estate of Calloway Kelley, deceased, to collect, for the satisfaction of his demand, an asset of the estate in the shape of a debt secured by a lien on land, which, the bill alleges, the administrator "has hitherto failed and refused to proceed to enforce." The intestate had sold to one Roland Miltebarger a tract of land for \$1,600 by a contract vesting him with the equitable title, the legal title being retained as security for the price. Only a part of the purchase money had been paid. The heirs and administrator of Miltebarger, he having died intestate after the sale, were made defendants, as were also the administrator and Eliza Kelley, the

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only heir of Calloway Kelley, deceased. The prayer of the bill was that the complainant's debt be ascertained, and also the liability of Miltebarger's estate to Calloway's estate, that a decree be rendered for these respective debts, and the lien on the land for the latter debt be enforced, and so much thereof as was necessary be applied to the satisfaction of the complainant's debt. Process was duly served on all the defendants, except two of the Miltebarger heirs, as to whom there was publication as non-residents, and the bill taken for confessed against them. The *pro confesso* was not taken until the defendants had been at the return term allowed until the end of the next term to answer, and had at the next term asked and obtained an extension of three months' time to file answers. At the November term, 1871, the bill was taken for confessed, and a reference made to the clerk to hear proof, and report the amount due from the Miltebarger estate to the administrator of Calloway Kelley for the land. The master reported the balance of said debt to be \$778.41, and the land was ordered to be sold therefor, and by the same decree, rendered at the November term, 1871, the master was ordered to ascertain the complainant's demand against the Kelley estate. The land was sold on March 30, 1872, to John W. Cox for \$1,100, "he being the highest, best and last bidder, who immediately passed his bid over to Samuel N. Kelley," and he complied with the terms of sale. The master filed his reports on April 16, 1872. He states in his report, ascertaining the complainant's debt at \$491.75, that "he

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notified the parties to attend at his office on the sixth day of April, 1872, with their proofs, in order that said account might be taken, when, the parties attending, the master proceeded to take the following account."

On May 6, 1872, during the term at which the reports were filed, the court, upon the application of the complainant, appointed D. K. Young guardian *ad litem* for Eliza Kelley, a minor defendant, the bill having so stated the fact, "and he, Young, being in court, accepts the appointment." An answer was thereupon filed by the guardian on the same day under oath. The court then heard the cause and confirmed the reports. This decree says: "And the defendant, Eliza Kelley, having answered the bill by D. K. Young, her guardian *ad litem*, since the sale was made, but because it appears to the chancellor that the sale was for the benefit of said minor, and that the said sale overpaid the amount of the vendor's lien, the same is confirmed. "And," continues the decree, "there being no exceptions to the report of the master touching the indebtedness of Calloway Kelley to the complainant, the same is confirmed." A final decree was accordingly rendered.

The writ of error in this case has been sued out and argued upon the idea that the bill was filed under the Code, sec. 2267, by a creditor to reach land descended for the satisfaction of his debt. But this is a misconception of the nature and object of the bill. The complainant, as a creditor of Calloway's estate, came into the chancery court, under a well

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recognized head of chancery jurisdiction, to compel the collection of a personal asset for the satisfaction of his demand upon the ground that the administrator was colluding with the debtor, and refusing to collect the debt: *Haywood v. Currie*, 9 Baxt., 357. The land sought to be sold was the land of the Miltebargers, not the land of the intestate, Kelley, which descended to his heir. The only interest of the estate in the land was the vendor's lien for the purchase money, as a mere incident to the debt, which went to the administrator. The heir of Calloway took only the naked legal title to the land in trust for the Miltebargers and the administrator. The only object of having the heir before the court was to divest this legal title, and she lost all interest in the land as soon as the purchase money was paid to the administrator: *Stephenson v. Yandle*, 3 Hayw., 109; *Irvine v. Muse*, 10 Heis., 477; *Lunsford v. Jarrett*, 11 Lea, 195.

The proceedings of the court below, however informal and irregular, are clearly valid as against the administrator of Calloway Kelley's estate, and have been acquiesced in by him. The only beneficial interest the heir had was in the collection of the debt due to her father's estate, which was collected, the land selling for more than the balance of debt. It was the duty of the administrator to see that the amount of this debt, as well as of the complainant's demand, was correctly ascertained. The chancellor and the guardian *ad litem*, the latter of whom filed no exception to the reports, must have thought that

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the interests of the ward were properly protected. But if they were mistaken, and the action of the court warranted by the case made as to the infant, the remedy of the appellant was against the administrator and his sureties, or the guardian *ad litem*. It is irregular to take any step in a cause wherein there is a minor defendant until a guardian *ad litem* has been appointed, but the irregularity is clearly cured, so as not even to be error on appeal, if no binding decree is rendered until the infant is properly represented, and the guardian *ad litem*, having the opportunity, acquiesces in what has been done, and the court decrees correctly on the case presented: *Grimstead v. Huggins*, 13 Lea, 728; *Ridgeley v. Bennett*, 13 Lea, 210; *Livingston v. Noe*, 1 Lea, 61. For the presumption is, that the guardian did his duty, and could find no substantial ground of complaint, and the decree is warranted by the case as submitted.

One of the irregularities most dwelt upon by the appellant's counsel is that the master's report of the Miltebarger debt shows that this debt was in the form of notes given after Calloway Kelley's death. But in view of the allegations of the bill, these notes were doubtless renewals allowed by the administrator by collusion with the debtor. So, it appears that some of the claims making up the complainant's demand were assigned after the filing of the bill. But these formal assignments may have been made to authenticate the complainant's title to claims already belonging to him.

Be this as it may, both debts have been validly

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established as against the administrator, and the only effect of reversal as to the heir would be to clothe her with the naked legal title to land in trust for the heir of her father's vendee, whose estate had paid the purchase money debt, and for those claiming under them. The result would be a cloud upon the purchaser's title, without the least benefit to the appellant. But the title was properly divested out of her as soon as the purchase money debt was settled with the administrator and the land sold in satisfaction thereof.

The report of the Referees will be set aside, and the decree below affirmed. The appellant will pay the costs of this court.

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LUM EATON v. THE STATE.

CRIMINAL LAW. *Costs. Work-house.* A prisoner convicted of a felony, whose punishment has been commuted to imprisonment in the county jail, may be required to work out the costs of the State, adjudged against him, in the county work-house, after his term of imprisonment has expired, if not otherwise paid or secured.

FROM KNOX.

Appeal from the Criminal Court of Knox county.
M. L. HALL, J.

W. F. YARDLEY for Eaton.

ATTORNEY-GENERAL LEA for the State.

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COOPER, J., delivered the opinion of the court.

The jury found the prisoner, Eaton, guilty of petit larceny, and commuted his punishment, as they were authorized to do by law (new Code, sec. 6072), from imprisonment in the penitentiary to imprisonment in the county jail for the period of ten months. Upon this verdict the trial court rendered a judgment that the defendant, for his said offense, undergo imprisonment in the jail of the county for the space of ten months, and that he pay the costs of the prosecution, for which execution may issue. The judgment has been affirmed upon the prisoner's appeal in error. A point is now made whether the judgment should not direct the prisoner to be confined until the costs were paid or worked out, or the prisoner otherwise discharged by law.

It is familiar practice in civil cases, says Mr. Bishop, that costs taxed against a defendant of whom damages are recovered become parcel of the damages, enforceable in the same way with the rest. Hence, by analogy, in criminal cases where costs are given against the defendant by statute, as one ordered to pay a fine is by the statute required to stand committed until he complies, so should be one condemned to pay costs as a part of his punishment: 1 Bish. Cr. Pr., sec. 1321. The court has the power in this State to order the defendant to stand committed until the fine and costs are paid. "No practice is better settled," says Judge Catron in *Hill v. State*, 2 Yer., 247. "Where," says the Code, "the judgment

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is that the defendant be imprisoned until the fine and costs, or the costs only, are paid, the defendant shall be committed to jail until the judgment is complied with, or the defendant discharged in due course of law": Code, sec. 5270. The Code also provides for the establishment and management of county and corporation work-houses, and then enacts as follows:

Section 5413. "In all cases in which a person is by law liable to be imprisoned in the county jail for safe keeping or punishment, confinement in the work-house, if one be provided, may, in the discretion of the court or justice, be substituted."

Section 5415. "If he be confined for failure to pay fine and costs, he shall be detained until he has paid the fine and costs by the proceeds of his labor, and shall not be allowed to discharge himself by the act of insolvency."

Section 5417. "After the term for which he is imprisoned has expired, he shall be detained until the fine and costs are paid as above provided."

The Code, sec. 5271, and afterwards the act of 1860, chap. 100 (T. & S. Rev., 5271a), which repealed it, provided a mode by which the defendant might be discharged "by due course of law." But this section and act were both repealed by the act of 1875, chap. 83 (new Code, sec. 6264), entitled an act to require persons convicted of misdemeanors to work out the costs of conviction. This act expressly provides that every person convicted of a misdemeanor, who fails to pay or satisfactorily secure the fine and

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costs adjudged against him or her, shall be sentenced to be confined, and shall be confined in the county work-house, after the term of imprisonment, if any, has expired, until he work out his fine and costs, including all jailer's fees accruing before and after conviction, and down to final discharge.

The result of this legislation is to make the working out of the fine and costs, or costs only, imperative in all misdemeanor cases, but it leaves confinement in the work-house, in lieu of imprisonment in the county jail, to the discretion of the court or justice under section 5413 of the Code. And the court in such cases has the power to order the defendant to stand committed until the fine and costs are paid. In this state of the law the Legislature passed the act of 1881, chap. 105, (new Code, sec. 6073), which provides: "That hereafter all persons charged with felony and convicted of the same, but whose imprisonment has been, by the jury, commuted to imprisonment in the county jail, shall be compelled to work out said term of imprisonment in the county work-house in the county where convicted." The intention of this act was to place such a convict on the footing of an offender convicted of a misdemeanor. And consequently in *Berry v. State*, at Nashville, during the December term, 1883, where the appellant was such a convict, and where the trial court had expressly adjudged "that the defendant pay the costs and remain in custody of the sheriff until the costs were paid or secured," we held the judgment valid and affirmed it. In the case before us, the trial court

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has rendered no such judgment as to the costs. But we think he should have done so, and proceeding to render the judgment which that court ought to have rendered, we order that he remain in custody until the costs are paid or secured, and, if not paid or secured, that he work out the same after his term of imprisonment has expired. The costs referred to are the costs of the State: *Knox v. State*, 9 Baxt. 202.

MARIA CLOYD v. THOMAS J. CLOYD *et al.*

REAL ESTATE. *Partition. Dower. Presumption of law.* Under a voluntary partition between a widow and her two children, of land descended from the husband and father, in which the widow receives one-third, including the dwelling-house and improvements, the presumption of law would be that the widow's allotment was in dower, and the execution by the parties at the time of a penal bond to abide the division would only strengthen the presumption.

FROM WASHINGTON.

Appeal from the Chancery Court at Jonesborough.
H. C. SMITH, Ch.

H. H. INGERSOLL for complainant.

I. E. REEVES and S. J. KIRKPATRICK for defendants.

COOPER, J., delivered the opinion of the court.

The chancellor, upon final hearing, dismissed the bill in this case, and the Referees recommend an affirmance of the decree. Complainant excepts.

Cloyd v. Cloyd.

The exceptions of the complainant to the report of the Referees narrow the litigation to the claim of the complainants to dower and homestead in a 32 acre tract of land. Many years ago, perhaps before the year 1840, David Winegar died intestate, leaving a widow, Rachel, and two children, James and Isabella. He died seized and possessed of a tract of land of about 96 acres, on which he had lived for many years. The widow and children continued to live together on the place until Isabella intermarried with William Cloyd, when the land was, under a written agreement between the parties, divided by the county surveyor and four neighbors selected by the parties, into three equal shares of about 32 acres each, the widow receiving the part on which were the dwelling-house and improvements, and each child taking possession of one of the other shares. This division was made between 1840 and 1844. James Winegar sold his 32 acres to a third person, and Cloyd built on his wife's 32 acres, and lived there until his death in August, 1873. Isabella, his wife, died about 1853, leaving seven children by Cloyd. Afterwards Cloyd married the present complainant. The widow Winegar continued to live on the 32 acres allotted to her until shortly before her daughter's death, when she seems to have gone to Cloyd's house and lived there until her death, about 1855. At some time, but when does not distinctly appear, James built a small house on the land allotted to his mother, but left after a short residence, and died intestate, without ever having been married.

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The complainant, after having been turned out of the possession of the 32 acres allotted to Isabella, and on which Cloyd and she had continued to live, by a purchaser from the Cloyd children, filed this bill on September 12, 1879, claiming dower and homestead in the 32 acres allotted to Rachel Winegar. After Rachel went to live with Cloyd, and perhaps for years before, Cloyd had farmed these 32 acres and supported her. After her death, he continued to cultivate the land until his death, all of his children by his first wife for the greater part of the time, and some of them all the time, living with him. The contention of the complainant is that in the partition between the widow Winegar and her children it was agreed that the widow should take the one-third allotted to her in fee, and that she had agreed in writing to give her part of the land to Wm. Cloyd, after her death, in consideration of his supporting her during life. It is further insisted that Cloyd has been in possession of the land, which was enclosed, for twenty years, claiming it as his own adversely to all the world.

The question of adverse possession, in the absence of a writing, clothing Cloyd with the legal or equitable title to the land, can cut no figure in the case. For the possession of the father was the possession of the children who lived with him, and would inure to their benefit, there being no proof of any adverse holding by him brought home to them: *Fancher v. DeMontegre*, 1 Head, 40.

The complainant's claim rests, therefore, upon

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Rachel Winegar having acquired, by the voluntary partition between her and her children, the fee of the thirty-two acres allotted to her. By law she took only a right to dower in her husband's lands, and inasmuch as she received exactly her dower interest under the partition, namely one-third thereof, with the dwelling-house and improvements attached, the presumption would be that she took the allotment in dower. The evidence should be clear and cogent to overcome this presumption, for the fee in the land allotted, with all the buildings, would be worth far more than a mere life estate therein. If any consideration had passed for the enlargement of the dower into a fee, or if the children had intended to make a gift to their mother, the fact would have been stated in the instrument shown to have been executed at the time, or mentioned in such a way as to impress itself upon the minds of the witnesses. Two witnesses testify to the writing and its contents; one of them thinks he was an attesting witness to its execution, and the other says he was one of the commissioners who made the division. Both of them agree that the instrument was a bond, signed by the parties, in a penalty binding them to "abide by the division" made by the persons selected. The deponent who thinks he was an attesting witness, adds: "There was nothing said in that division about the widow's dower, nor taking dower; nothing was mentioned about dower." The other witness says: "She (the widow) took one-third of the land as laid off to her. There was nothing said about her taking a

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child's part. I don't know that this was to be her land absolutely; there was nothing said about its being a dower. It was just divided equally between the three." This testimony, it is obvious, does not show an allotment to the widow in fee. On the contrary, it does very conclusively establish that the sole object of the writing was to bind the parties to the division, and consequently the parties would only take such interest as was vested in them by law. Other witnesses, cognizant of the partition, do not hesitate to say that the allotment to the widow was only in dower. And two or three witnesses testify that Cloyd told them years afterward that he had James Winegar's bond for his interest in his mother's share of the land, thereby showing that Cloyd knew the fact that her interest was only for life. The complainant not only fails to make out the clear case required by law, but the evidence conclusively establishes the contrary.

In this view, it becomes unnecessary to analyze the testimony touching the alleged conveyance from Rachel Winegar to William Cloyd. Suffice it to say, that we concur with the chancellor and the Referees in the conclusion that the evidence fails to establish satisfactorily the execution of the instrument claimed. Confirm report, affirm decree, and dismiss the bill with costs.

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J. A. GOODWIN v. M. E. THOMPSON.

1. RIVERS. *Navigable. Soil below low water-mark.* The soil below low water-mark of the rivers of this State navigable in a legal sense, as well as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the State for the use of the public.
2. SAME. *Same. Same.* The title to the soil under the waters of such navigable streams cannot be acquired by individuals under our general land laws, and a grant thus obtained, which undertakes to include the bed of such a navigable stream, and to give the grantee the exclusive privilege of taking from the bed of the stream so included sand, gravel, and other deposits found therein, is to this extent void.
3. SAME. *Same. Same. Quere,* whether the Legislature, under our Constitution or upon general principles, can, by express grant, confer upon an individual the exclusive title to the soil under a navigable stream, especially after the Congress of the general government has undertaken to improve the navigability of the stream.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W.
B. STALEY, Ch.

TAYLOR & HOOD for complainant.

HOOD & TAYLOR for defendant.

COOPER, J., delivered the opinion of the court.

Action commenced before a justice of the peace, "for taking five loads of sand from the lands of plaintiff," and tried in the circuit court upon an agreed statement of facts. The trial judge rendered a judg-

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ment in favor of the plaintiff for a part of the sand sued for. Both parties appealed in error.

The defendant holds land, under a grant from the State of North Carolina, lying on both the French Broad and Tennessee or Holston Rivers near their junction. The grant calls for the bank of the river at the point of junction of the two streams, thence up the south bank of the French Broad river with its meanders for the distance of half a mile, thence, after one or two calls, to the Tennessee or Holston river, thence up said river with its meanders to the beginning corner. Part of the sand was taken from the beds of both rivers, in front of the land thus bounded, between low water mark and the center of the stream. Another part was taken from the bed of the French Broad river between the center of the stream and the low water mark of the north bank, being the bank of the stream opposite to that called for by the defendant's grant, and the judgment of the circuit court was for that part of the sand so taken. The plaintiff claims under a junior grant from the State of Tennessee, issued in 1870, for about 7,000 acres, which covers the bed and both banks of the French Broad and Tennessee rivers where the sand was taken, and in express terms grants to the plaintiff the exclusive privilege of taking from the bed of said streams, within the boundaries of the grant, sand, gravel, and other deposits found therein. The agreed facts show that both rivers are navigable in a legal sense above and below the lands covered by the grants, and that the United States government has been for

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years, under acts of Congress, expending money on both streams, above and below the lands granted, for the purpose of improving the navigation.

Our courts, while adhering to the rule of the common law that the owners of the banks of streams not navigable in a legal sense take title to the center of the water, subject to the public easement for purposes of navigation, have adopted the civil law as to streams navigable in a legal sense, and held that the call in a grant for such a river, or for a point on its bank, and thence up or down with its meanders, carries title at most only to low water mark, the soil covered by the water, as well as the use of the stream for the purpose of navigation, belonging to, and remaining in, the public: *Elder v. Burrus*, 6 Hum., 98; *Martin v. Nance*, 3 Head, 649; *Stewart v. Clark*, 2 Swan, 10; *Posey v. James*, 7 Lea, 98. Under these rulings, it is clear that the defendant has no title to the soil under the rivers called for by his grant below low water mark. And the only question raised by the agreed facts is whether the complainant's grant gives him any better right. That grant not only covers the two rivers, but expressly undertakes to give the grantee the exclusive privilege of taking from the beds of those streams, within its boundaries, "sand, gravel and other deposits found therein."

By the civil law, which we have adopted, the soil of a navigable stream covered by the water, as well as the use of the stream, belongs to the public. The title claimed by the plaintiff in this case to the

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beds of the two rivers, as well as his claim to the sand, gravel and deposits in the streams, is, of course, incompatible with the title of the public to the soil under the water. It is upon him to show that he has acquired the title of the public in some legal mode which divested that title out of the public and vested it in him. If it be conceded that the Legislature, as the representative of the State, has the power to pass the title of the public to the plaintiff, he does not claim that the Legislature has directly, by a legislative enactment, clothed him with the title. The agreed statement of facts shows that he merely obtained a grant, based upon regular survey and entry, under our general land laws. And the first point to be considered is, whether our general land laws admit of such a grant.

By the common law, the title to the soil under the waters, where the tide ebbs and flows, as well as the use of the waters, was vested in the sovereign for the public use: Hale *de juremaris*, chap. 3; *Warren v. Matthews*, 6 Mod., 73. The sovereign might, it seems, make grants of these waters, *e. g.*, for the purpose of a fishery, subject to the use of the public for navigation: *The Royal Fishery of the River Boyne*, Davies' Rep., 149. It is probable, as has been held by the Supreme Court of Mississippi, that the common law doctrine was borrowed from the law of nations, tidal waters being public highways for all nations, over which, consequently, the State only could hold title or exercise control: *Steamboat Magnolia v. Marshall*, 39 Miss., 109. The idea of the sovereign, as an individual, having any property right

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in such waters has no doubt ceased to be entertained in England, and can hardly be said to have ever been recognized in this country. The almost universal doctrine in this country now is, that the State, in the case of land bounded by the sea, or an arm of the sea, holds the fee in trust for the public; 3 Wash. Real Prop., 359. "The civil and common law," he adds, "substantially concur in this respect, with the exception that, by the former, the seashore extended to the highest winter tide, whereas by the latter it is limited to the ordinary high water line." In the case of the lands originally held by the colonial government of Massachusetts, the government stood in two relations to its subjects, one as owner of the land to be granted to purchasers and settlers, to be held in severalty in fee, the other a prerogative right to the sea and seashore, in a fiduciary relation for the public use: *Commonwealth v. Roxbury*, 9 Gray, 492. And this seems to be the attitude of those States, in the matter of its public lands, in which the civil law has been adopted in regard to navigable streams. They hold the land to be granted to purchasers and settlers in fee, and the soil under its navigable waters, as well as the use of those waters, in a fiduciary relation for the public use. The presumption would be that the State only intended to exercise the former power in their general land laws, designed to enable the citizen to acquire title to a specific part of the public domain in severalty, and exclusively, free from all public use. The point was raised before the Supreme Court of the United States, under similar acts

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of Congress, and Mr. Justice Clifford, who delivered the opinion of the court, seemed inclined to take that view, but the court preferred to put the decision upon the ground that the acts of Congress making provision for the survey and sale of public lands reserve the rights of the public to the navigable streams: *Railroad Company v. Schurmeir*, 7 Wall., 272. The act of Congress relied on provided: "That all navigable rivers within the territory to be disposed of shall be deemed to be and remain public highways; and in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both." Mr. Meigs, in his argument in *Elder v. Burrus*, 6 Hum., 359, makes the same claim for our land laws, citing the laws, some of which do provide that when a survey is made on any navigable water, the water shall form one side of the survey. Be this as it may, we know that the Legislature of this State has always been studiously careful of the rights of the public to the use of its navigable streams, frequently enacting that certain streams were navigable which, perhaps, scarcely deserved the honor. And our courts have settled as the common law of the State that the soil under the waters of navigable streams, as well as the use of the waters, belongs to the public. This was said in a case in which one of the grants covered the stream and both banks, and would, in the opinion of the judge, have given to the grantee an island in the river, if the river had been navigable in a legal sense: *Stuart v. Clark*, 2 Swan, 10. The

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idea of this eminent judge manifestly was, that even if the lines of a grant crossed a navigable stream so as to include a part of the river bed, all that the grantee could claim would be both banks, and any island in the river to low water mark, the bed of the river between the low water mark still belonging to the public. There is an expression of opinion to the contrary by Judge Crabb in *Roberts v. Cunningham*, M. & Y., 67. But this intimation was made at a time when the great weight of authority was that navigable waters were limited to the ebb and flow of the tide. We think that the public use of our navigable rivers imperatively requires that the soil under the water should be in the State in trust for the public; that the title to the soil under such streams was not intended to be secured by individuals under our general land laws; and that any person setting up a claim thereto must be able to show an express legislative grant.

This conclusion renders it unnecessary to determine whether the Legislature, under our Constitution, or upon general principles, could confer upon any individual or individuals a several and exclusive title to such property. "Navigable waters," says Judge Cooley, "are for the use of all the citizens, and there cannot lawfully be any exclusive private appropriation of any portion of them": Cooley Const. Lim., 736, citing a number of cases. The conclusion also renders it unnecessary to consider the effect of the acts of Congress, making appropriations to improve the navigability of these streams, upon the right of the State to make

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any grant which would give to individuals a right to interfere with the bed of the stream.

The judgment of the circuit court will be reversed, and a judgment rendered here in favor of the defendant against the plaintiff for the costs of the cause.

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BANK OF ROME *et al.* v. J. C. HASELTON *et al.*

1. CHANCERY PRACTICE. *General creditors' bill.* Several creditors of an insolvent firm of non-resident partners, doing business in Tennessee, may unite in filing a general creditors' bill on behalf of themselves and all other creditors, who will make themselves parties thereto, and, if the debtors do not object, may, under attachment, impound all their property for the joint benefit of all creditors coming in under the bill; and creditors impeaching the proceeding cannot participate in its benefits.
2. SAME. *Same.* It is not a fatal objection to such a proceeding, that no order was made that it should stand as a general creditors' bill, and publication be made accordingly, for all creditors to come in under it.
3. SAME. *Attachment. Impeachment by other creditors.* *Semble* that a subsequent attaching creditor may impeach an attachment for defects on its face; and also, where the debtor and attaching creditor reside in the same foreign State, though this fact is not apparent in the proceeding.
4. MORTGAGE OF MERCHANDISE. *When void.* A mortgage of merchandise is fraudulent and void if it appear, either on the face of it or by other proof, either direct or circumstantial, that it was the intention at the making of it, that the mortgagor should keep possession with the right and power of disposing of the mortgaged goods.
5. WAREHOUSE RECEIPTS. *Act of Assembly.* The warehouse act of 1879 is not in violation of Section 17, Article II, of the Constitution.

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6. *SAME. Effect of.* Warehouse receipts, issued in accordance with said act, are negotiable, and vest the holder with title to the property described in them.
7. *SAME. Description of property.* A warehouse receipt which describes the property as "50,000 pounds of bar iron, assorted, made at the Vulcan Works" is sufficient, though the property is stored in mass with other property of the same kind, so as not to be susceptible of identification by mark or otherwise.
8. *SAME. Possession of warehouseman.* It is not fatal to the receipt that the property was in the warehouse of the manufacturer (the pledgeor), *provided* that a regular warehouseman have the same rented, and the actual, exclusive custody of the same.
9. *SAME. Loan and exchange of property.* Nor is it fatal to the receipt that the warehouseman lent the pledgeor property covered by a receipt, on his promise to return a like quantity of similar kind, *provided* the same is returned and stored before it is seized by an attaching creditor.
10. *ASSIGNMENT. Notice to agent.* A notice in this State to a resident purchasing agent of a foreign railroad corporation that the debt due on one of his purchases has been assigned, is a sufficient notice to the corporation to perfect an assignment.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

BARTON & SON, WHEELER & MARSHALL and CLIFT
& BATES for complainants in general creditors' bill.

KEY & RICHMOND and J. A. CALDWELL for Ward
& Hamill and others, attacking creditors.

J. B. & T. H. COOKE for Lowe and others.

TOM. FORT for Wason Car & Foundry Company
and others.

DODSON & MOON for Wehl.

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J. J. MCGLOHON for Musgrove.

INGERSOLL, Sp. J., delivered the opinion of the court.

Within these ten consolidated causes are contained the controversies of about one hundred creditors for priority of satisfaction of their respective demands out of the assets pledged, mortgaged and unencumbered of an insolvent firm of iron-makers. The record presents many questions of substantive law and of procedure, involving the constitutionality of statutes, the validity of mortgages, attachments and pledges, powers and duties of warehousemen, the character and effect of warehouse receipts, and the rights of holders thereof, the nature and requisites of a general creditors' bill, and the course of proceeding thereunder, the understanding of which requires a full statement of the circumstances of the case and an outline of the progress of a very complex proceeding.

In 1877, Haselton & Harris, both then residents of New Jersey, began as partners to operate the "Vulcan Works" at Chattanooga for the manufacture of iron, nails, etc. The business was carried on till May 28, 1880, when the firm failed, and under attachment bills filed in the chancery court at Chattanooga, their mills and property were all placed in the hands of a receiver. The two members of the firm had contributed each \$30,000 to its capital. They had purchased the "Vulcan Works" on credit, and committed the entire supervision and control of their business to one Stone, as their attorney-in-fact and manager. He so conducted and managed the busi-

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ness that at the end of the three years of operation the firm had amassed an indebtedness of more than \$300,000, while their assets were about one-third of that sum. The failure is attributed to the shrinkage in value of iron, and the great falling off in sales of the product of their mills in 1880.

The conduct of the business included the purchase of scrap-iron, pig-iron, coal, coke, etc., the puddling and rolling of the iron, the manufacture of nails and spikes, keeping a supply store, and the storing, sale and shipment of the product of the mills and factories, and the other incidents of a large iron manufacturing enterprise. The firm was probably insolvent during the last year of its existence, but by energy and a system of shrewd financiering, manager Stone succeeded in keeping the large business in operation and the firm's credit fair up to the day before the failure, when the partners, on a visit to Chattanooga and conference with him, determined that a longer struggle to keep afloat would be unavailing, and concluded, instead of making an assignment, to let their business and creditors take care of themselves. In the week following May 27, 1880, these ten bills were filed, and all the visible property of the firm was seized for the benefit of the creditors. J. C. Warner and others had filed their bill on May 27 to attach certain property for their debts. But as their priority is conceded, and the proceeds of their sale were insufficient to satisfy their debts, this suit need not be further noticed.

The leading bill in the consolidated causes is that

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filed by the Bank of Rome, Georgia, the Roane Iron Company, and the First National Bank of Chattanooga, on May 28. It shows an indebtedness of about \$6,000 to the Bank of Rome, due and unpaid, and to the other two complainants of about \$18,000, of which from \$4,000 to \$5,000 only, was matured; it alleges that the firm is insolvent, and that the members are non-residents of Tennessee, and reside in New Jersey, and on this ground prays for an attachment; because of their temporary presence in the State personal process is also asked against them; it is further alleged that the closing of the mills and factories would cause great hardship among the employes and their families, and therefore asks for the appointment of a temporary receiver to continue the operation of the mills and factories, as well for the benefit of the creditors as of the employes and the public. There is also a prayer that this bill "may be filed in behalf of themselves and all other creditors of the firm who may make themselves parties to this bill by petition in the nature of or as a general creditors' bill;" and that the attachmant inure to the benefit of all such creditors; that their claims be adjudged, and the attached property sold for satisfaction, not only of the debts then due, but also of those thereafter to mature. Before filing the bill a *fiat* was obtained from the circuit judge for an attachment on a bond of \$5,000, and also an order appointing J. C. Warner, on his giving bond in a like sum, receiver of the property. This temporary appointment, before even the filing of the bill, was

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made, as the order recites, "in view of the particular nature of the case, and for the reasons assigned in the bill." On the same day subpoena to answer was issued. The defendants acknowledge, by their solicitor, due and legal service of the same. The attachment was duly levied on all the property of Haselton & Harrison at the Vulcan Works, subject to any prior valid legal lien; and the property was turned over to the receiver. The officer did not include in this levy "a large lot of pig-iron, muck-bar and manufactured iron" pointed out and claimed by S. B. Lowe as his property.

No order was ever made that the bill be filed or stand as a general creditors' bill, nor was any order of publication made for creditors to appear and file their claims in said cause. Yet on the very day of the filing of the bill, other creditors began to treat it as a general creditors' bill, and filed petitions therein, asking the benefit of the proceeding, and in the next twelve months no less than twelve petitions were filed, embodying the claims of forty or more creditors. One of these, filed on the day after the filing of the bill, assumes the form of an answer and cross-bill, contesting the demands of the complainants, and setting up in favor of the employes an alleged lien for labor on the product of the mills. Of all these petitions only two—those of the Soddy Coal Company and others and Musgrove and others—pray for separate writs of attachment. Such writs were issued and duly levied on the property of the firm, so that these petitioners obtained a distinct status

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in the case, differing from that of those petitioners who rely solely upon the general attachment sued out by the original complainants in the cause.

On May 31, 1880, some twenty creditors, declining to avail themselves of the offer in the "general creditors' bill," and accept the benefit of the attachment therein, filed a distinct bill under the style of Ward & Hamill and others against all the parties, complainant and defendant, to the leading bill, and also against one S. B. Lowe, an iron-factor and warehouseman; in which, after reciting the allegations of said leading bill and the proceedings thereunder, they impeach the validity of the appointment of the receiver therein, because made in vacation, without notice or sufficient cause shown; they impeach also the validity of the attachment: First, as to the debts admitted to be not yet due, because the only ground alleged for attachment was the non-residence of the debtors. Second, as to the debt due the Bank of Rome, because the debtor, Hamilton, was not, as alleged in the bill, a resident of New Jersey, but was in fact a resident of Georgia, wherein also said bank had its residence, and it was not charged, as required by statute, that the property of said Harrison or the firm had been fraudulently removed to this State to evade legal process in Georgia. This bill also charges the firm with fraudulent conveyances of its property: First, in making a mortgage of merchandise and other chattels for the benefit of the First National Bank of Chattanooga, and retaining the possession and continuing the sale of the merchandise; second, in placing

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in the hands of said Lowe hundreds of tons of nails, spikes and bar-iron fraudulently and for the purpose of hindering and delaying their creditors, which property Lowe was aiding them to cover up and conceal by claiming it for himself and others holding his warehouse receipts. This claim of title by Lowe is attacked because his warehouses were at the "Vulcan Works," on the premises of Haselton & Harrison, and because, as alleged, his own debts are, many of them fictitious and fraudulent, his manner of obtaining possession of much of the property was fraudulent, his manner of holding it all was fraudulent; that without registered chattel mortgage he could not hold it; that his warehouse receipts were issued in violation of the statute requiring actual possession, and hence were invalid; and moreover, that the iron was all stored in bulk, so that the various lots could not be separated or identified. Wherefore, they pray for attachment to be levied on all the property in the receiver's hands, and all other property of the firm at the Vulcan Works, including that claimed by Lowe; and that Lowe be enjoined from disposing of any of said property; that they have judgment for their several debts and priority of satisfaction over the creditors in the leading bill.

Moross & Co. and others seek by their bill, filed June 1, to reach especially a debt due to the firm from the Alabama & Great Southern Railway, and for this purpose to set aside an alleged fraudulent and unauthorized assignment of the same by manager Stone to S. B. Lowe.

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The Wason Car and Foundry Company and others file their bill June 3, containing, in addition to the allegations in the bill of Ward & Hamill, an allegation that Haselton & Harrison are in law residents of Tennessee, because of their large business operations here by a general agent, and hence all attachments sued out against them on the ground of non-residence are invalid; also, that many attaching creditors holding mortgages or collaterals have waived and released their security by filing bills without therein referring to the same; they insist that there is no such thing known to the laws of Tennessee as a "general creditors'" bill in a case like the present; that the warehouse receipts are in effect unregistered chattel mortgages, and invalid; that the "warehouse act" of 1879, chap. 236, is unconstitutional, and the receipts for this cause also are invalid; and also because the iron was not actually in Lowe's possession when they were given.

On the same day W. G. Lewis and others file a bill of substantially the same character.

Also on the same day the National Banks of Rome and of Cleveland unite in a bill, as an original bill, in the nature of a cross-bill, to the bill of Ward & Hamill and others, claiming title to certain quantities of the iron, nails and spikes attached by said bill, because of their holding the warehouse receipts of Lowe therefor, received by them as collateral for certain loans made by them to Haselton & Harrison solely on the faith of said receipts then assigned to them, and they ask to be allowed to reclaim their property.

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Also on the same day Crutchfield & Co. file their bill attacking the chattel mortgage and the warehouse receipts as fraudulent and void, and attaching the property described and covered by these instruments, and also the debt due from the Alabama & Great Southern Railway, to secure their debt.

The other bills filed do not call for special mention.

July 8, 1880, an order was made consolidating these ten suits, wherein it was directed that the bills in the various causes should stand as answers in causes specified; and thus the issues were made up between the various creditors. The debtors failed to make defense, and *pro confesso* was entered against them.

An *instant* report of the master, filed on the same day, showed that the debts for which attachments were levied on the property claimed by Lowe amounted to over \$17,000; and on the following day Lowe was, by consent order, permitted to replevy the property on giving bond for the same in the penal sum of \$17,000. This bond was executed on July 10, and this property was returned to the possession of Lowe.

The complainants in the leading bill, in their answers to the bills attacking their liens by attachment, insist that the objections taken therein to their attachment were solely matters of personal privilege to the debtors, as was likewise the appointment of the receiver; and that no one but the debtors could take advantage of irregularity therein.

In addition, the First National Bank of Chattanooga, while admitting that its trustee did not take possession

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of the stock of goods at the date of the mortgage, protests its good faith and honest intention in taking the same, shows the validity of its debt, and excuses its delay in taking possession by the fact that the mortgage was not registered till the day before the failure.

The answer of Lowe, filed in the consolidated causes November 6, 1880, contains a full history and explicit statement of his dealings with the firm, a detailed account of their manner of doing business, showing how and why he had possession of so much of the product of the mills and factories; denies all fraud, and protests his ignorance of the insolvent condition of the firm till the day before its failure; insists that his claim to the chattels and *choses in action* is valid and upon a valuable consideration, and that he holds the iron, nails and spikes not only for his own security, but largely for the benefit of the holders of warehouse receipts given by him to manager Stone on deposit of the iron, nails, etc., and by Stone negotiated or hypothecated to banks and others for money advanced or lent to carry on the business; and exhibits statements of his own account with the firm, and also of his outstanding receipts, and the names of the holders thereof, so far as known to him. He admits that the bar-iron, nails and spikes were stored in warehouses, appurtenant to the mills and factories, with no sign upon them to indicate his separate possession, but says they were leased to him by manager Stone, and that he was the sole and exclusive occupant; that his clerk always carried the keys, and he had sole custody and control of the

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property stored therein; and his possession was not concealed from any one. He also admits that the pig-iron and scrap-iron for use in the mills and factories was stored outside the warehouses in the yard around the works contiguous to the warehouses, but says it was nearly all marked, and all of it susceptible of identification by his clerk and manager Stone. He admits that on the night preceding the appointment of the receiver, as he is informed and believes, said Stone put about one hundred kegs of nails in the nail-house, but this was done without his knowledge or consent, and he never claimed these nails, nor gave any receipt therefor. His use of the warehouses and yard for the purpose of storage was because his own warehouse in the city was not commodious enough, and also for convenience and economy to save the expensive item of drayage, and enable him to store and handle the products of the "Vulcan Works" with facility and dispatch. He admits that the several deposits of iron for which his receipts were given were not kept separate, so that the exact iron for which each receipt was given could be identified and separated from the rest, but says the iron stored was "merchant bar iron" of various sizes; and as each lot was stored it was weighed and entered on the warehouse books, assorted by sizes, and each size placed by itself according to the recognized usage and custom of the trade; and there was always on hand the full quantity and same quality of iron called for in the warehouse receipts. The nails and spikes were also handled in like manner.

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Only a small per cent. of the product of the mills and factories was stored with him, and this was such only as there was no order or immediate sale for; and when the firm had orders for sizes of iron not on hand, he had, in a few instances, lent to the manager from his warehouse small lots for a short time; but these amounts borrowed were always returned by the next day, but not always in the same sizes. He shows that he was a factor and commission merchant as well as a warehouseman, and sold iron for the firm, making weekly statements to them of account of sales, and paying first, after charges, the debt secured by the iron sold, and crediting surplus on his own claims, as factor and warehouseman, for the security of which all the iron stored was pledged to him; the decline in price of iron was so great that the iron stored was not enough to secure him, and on the day before the failure, in response to his demand, manager Stone delivered to him an additional amount of iron, bolts, spikes, etc., for his security as a pledge on his claims, which amount is specified and detailed in Ex. C to the answer. He says he did not learn of the insolvency of the firm till the day before the failure, and then his action was taken solely for the honest purpose of securing the payment of his *bona fide* debts. This answer of Lowe is on oath, and is corroborated by the deposition of Stone in most particulars, and must be taken as true, save in the few points when it is overcome by countervailing proof; and they do not materially affect his statement.

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Of the many questions presented, the following are material to the case:

First. Is the bill of the Bank of Rome and others against Haselton and others to be maintained and treated as a general creditors' bill?

I was of opinion that the complainants did not show themselves to be creditors of any class permitted, either by the general rules of equity practice (1 Dan. Ch. Pr., 235-9), or by our statutes, to file a general creditors' bill, and impound all the property of the defendants for the benefit, not only of themselves, but also of such other creditors as might become parties thereto; that there is no recognized precedent for such a bill upon the facts alleged, and if the debtors had objected, it would have been fatal to the bill as a general creditors' bill; that other creditors are not estopped by the acquiescence of the debtors, since that would enable the debtors and certain creditors to thus in effect produce a general assignment by formal court proceeding, and avoid the restrictions placed by our statute around such assignments by deed, thus accomplishing by indirection what in regular and usual method is forbidden; and therefore that other creditors might by original bill impeach the proceedings as irregular and unauthorized, and thus defeat the bill as a general creditors' bill, and gain by their own separate attachment priority for themselves over parties who came in by petition without process under such bill, relying solely upon the original process for lien and security, and especially over such as came in after the filing of their

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separate bill and the levy of their separate attachment.

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A majority of the court incline to the view of Prof. Pomeroy (1 Eq. Jur., sec. 410), that a general creditors' bill may be filed to settle the affairs of an insolvent partnership or individual, as well as an insolvent corporation, as was permitted in the United States Circuit Court for Virginia in the recent case of *Fink v. Patterson*. But without so expressly ruling, they hold that this bill may be maintained as a general creditors' bill, because the debtors have submitted to it as such without objection, and allowed their affairs to be thus administered; that therefore the proceeding and lien cannot be impeached by the outstanding creditors; and moreover, that the general creditors' bill, with the assent of the debtors, operated to produce in effect a general assignment, and the outstanding creditors, by refusing to accept and by impeaching the same, debarred themselves of the right of participation in its benefits; and all such are therefore postponed to those creditors who did come in under the general creditors' bill, and accept the benefit of the attachments levied under it. And all the attachments issued under this bill, whether in pursuance of the prayer of the original bill, or on the subsequent petition or prayer of creditors who came in under it, inure to the joint benefit of all the creditors who became parties to said bill.

I was also of opinion that the failure of the court to make an order that this bill should stand as a general creditors' bill, and to direct publication for all

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creditors to appear, was a weighty, and perhaps fatal, objection to this bill which the unwilling creditors might make by original bill, especially before any decrees were rendered in the case: 2 Dan. Ch. Pr., pages 1203-4. But the majority of the court hold that inasmuch as creditors generally appear to have accepted its offers, and come in under it without such order or publication, the defect in the proceeding is but an irregularity at most, and does not, on the attacks here made, vitiate the proceeding.

Second. The second question is whether these subsequent attaching creditors, standing out against the general creditors' bill, may impeach the validity of the attachments issued under that bill, either for defects apparent, or for matter to be shown *aliunde*, and may question the appointment of the receiver, the debtors themselves submitting to the same.

As to the matter of the receivership, since it has terminated and the funds are in court for distribution, the question is no longer a practical one, and does not therefore demand decision.

The attachment settled priority of right, and is therefore important. It was issued upon no other statutory ground than that of the non-residence of the debtors; yet by it complainants sought to secure debts not due. This was a fatal defect (new Code, sec. 4194), and it was apparent on the face of the proceedings.

It was alleged in the attacking bill, and shown by proof, that one of the debtors, Harrison, and one of the attaching creditors in the leading bill, the

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Bank of Rome, were both citizens of Georgia. In such case our statute provides (new Code, sec. 4193) that "the creditor *shall not have attachment* against the property of his debtor unless he swear that the property of the debtor has been fraudulently removed to this State to evade the process of law in the State of their domicil or residence." No such oath was taken. The defect was fatal. It was not apparent on the face of the proceedings that the statute was violated; this was made to appear clearly in proof *aliunde*. I was of opinion that the attacking creditors might assail the attachment on both grounds, and gain whatever benefit would result from defeating them *pro tanto*; that even the consent of the debtor would not give validity to an attachment lien based upon proceedings which showed upon their face a fatal defect; and that another creditor might defeat the asserted lien, though the debtor had failed to make any defense; since, in a "race of diligence among creditors," the swiftest and most enduring can obtain no prize unless he has gone over the course marked out by law; and though he be first at the goal, he must yield the prize to a second who has conformed to law. I was also of opinion that the consent of a non-resident debtor to the attachment of a non-resident creditor from the same State, would not give validity to such writ when obtained in the face of the positive statutory inhibition; that this statute was one of public policy for the protection of home creditors, and the abatement of the attachment was not a matter of personal privilege to the debtor, but that

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any other creditor might impeach such an attachment, and if the invalidity was not apparent on the face of the proceedings, he might show the facts, which would, under the law, defeat the attachment. And in these views a majority of the court were inclined to concur. But they hold that in this case the attacking creditors can gain no benefit from their assault, because, by upholding the leading bill as a general creditors' bill, validity has been given to the attachments therein issued, and thus a lien firmly fixed upon the property for the joint benefit of all creditors coming in under it, and not only for debts due, but also those not due, at the filing of the bill.

Third. Next to be considered is the deed of trust to Montague for the benefit of the First National Bank. Does it afford a valid security?

The entire instrument is as follows: "In consideration of the sum of five dollars to us paid, and for the purpose of securing a note dated this day, and made by us to the First National Bank of Chattanooga, due at thirty days, for the sum of \$9,000, we do hereby sell, transfer and convey to T. G. Montague eleven mules, two horses, four wagons and harness, being the same mules, horses, wagons and harness now used by us in connection with the Vulcan Iron and Nail Works in Chattanooga; also all our merchandise now in store at said iron and nail works. If we pay said note at maturity this deed is to be void; but if we fail so to do, then said Montague is authorized to take possession of said property and sell the same, or so much thereof as

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may be necessary to pay said note, together with all the expense of executing this trust; the residue he shall pay to us or our order. Said trustee is authorized to make said sale in such manner and on such terms as he deems best for the interest of all parties. He may sell at public or private sale, for cash or on credit, and on such notice as his judgment may dictate. This, May 22, 1880. Haselton & Harrison."

It was proven May 27, 1880, and noted for registration at 2:30 P. M., same day. Haselton & Harrison remained in possession of the goods and chattels after, just as before, giving the deed, until May 28, when they were seized by the officer under the attachment, sued out in the leading case by the First National Bank and others to secure other indebtedness than that for which the mortgage was given. Montague was cashier of the bank, and familiar with the operations of Haselton & Harrison. Between the date of the deed and the seizure of the property, the debtors continued to use the chattels and to sell the goods, disposing of about \$800 worth, chiefly to their own hands; and this without either the objection or the express assent of Montague. In the bill in the leading cause, which is sworn to by him, this mortgage is not mentioned; but it was evidently in mind in framing the prayer that the attachment be levied upon all the property of "Vulcan Works not already incumbered by valid liens." The \$9,000 note represents a valid debt; and, so far as appears, the purpose of the parties in executing the mortgage was to secure the same, and not dishonestly to defraud

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other creditors. The property embraced in it did not exceed in aggregate value the amount of the debt. The attack upon the security is based on other grounds, viz: First, that by the mortgage the debtors were to remain in possession of the merchandise with liberty to carry on the business after, just as before, the deed. Second, that by the court proceedings the bank waived and abandoned the mortgage. .

In *Bank v. Ebbert*, 9 Heis., 153, the mortgage contained an express reservation that the debtor, without bond, should keep possession of the stock of merchandise (liquors), and carry on the business, selling and buying just as before the deed, and the trustee should take possession only on default of payment of the note first due. For this reason the deed was declared void, because "although there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet there are such *facilities for fraud* contracted for on the face of the deed that it must be held wanting in legal good faith. * * * There is a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors, in being able to keep their stock in trade covered up from execution, or attaching creditors, while they continued to use the same in defiance of their demands for profit, and with the means of appropriating the proceeds to their own use."

This case is disputed as a precedent for the present cause, since no benefit or facility for fraud is *contracted for on the face of this deed*, there being no special stipulation in it that the debtor shall remain in pos-

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session and carry on the business of merchandising until the default. This distinction is obvious. Does it affect the result?

In the *Ebbert* case, the court, following *Twynne's* case, wherein the sale was held void, because the debtor "continued in possession of the goods and used them as his own; and some of them he sold; and he shored the sheep and marked them with his own mark," adhered to the old doctrine of liberal exposition and application of statutes "to prevent fraud, which doth so much abound in these days," and announced as the basis of decision in that case, "that any conveyance that puts the property of the debtor in the name of a third party, so far as the legal title goes, and leaves it in his possession, and under his control, with the right to continue to use it in trade, sell and dispose of it as before the conveyance, lacks the essential elements to sustain such a conveyance as against a creditor."

And in the well considered case of *Phelps v. Murray*, 2 Tenn. Ch. Rep., 746, in which the leading cases were reviewed and analyzed, Judge Cooper held that the conveyance, which was "of our entire stock of goods, * * * now in our store, * * * and any other goods which may, during the existence of this mortgage, be purchased by the grantors and put into the store," being of that class where "a mortgage lien is sought to be created on personal goods, the only profitable use of which is as articles of commerce, and an unlimited power of disposition is reserved, was invalid at law and not enforceable in equity," "upon

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the ground that such a transaction, irrespective of fraud, is *against public policy*, throwing open too wide a door for possible fraud."

By the deed in the present case the legal title to the goods and chattels is put in Montague; but he is not to take possession for thirty days; nor is the possession to be given to another; the debtors are to keep the goods; and, since there is nothing to forbid it, they may use them. The only profitable use of a stock of goods in a store is to sell them. The debtors made this use of them evidently with the knowledge of the creditor and the trustee, neither of whom forbade it. It is obvious that it was intended by Montague and manager Stone, that the debtors should so use the goods; though the power of sale is not expressly contracted for, it is plainly implied; and the deed was so construed and acted upon by the parties, and was thus as efficient for advantage to the debtor and injury to the other creditors, as though the right had been expressly contracted for.

Though the parties may have been honest in their intentions, it is obvious that at the time of making this mortgage, it was understood between the parties to it that the mortgagor should retain possession of the goods and keep open the store and retail the same after the mortgage just as before. It is this intention to allow the mortgagor the right of disposition, whether that intention appear on the face of the deed, or by express oral declaration of the mortgagee, or is inferred from the relation and conduct of the parties, which, in the opinion of the majority of the court (Judges Free-

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man and Cooper dissenting), stamps the mortgage as void: Pierce on Mortgages of Merchandise, ch. III. And being void as to the merchandise, it is settled by our decisions to be void as to all the property embraced in the mortgage: *Simpson v. Mitchell*, 8 Yer., 419; *Richmond v. Crudup*, Meigs, 581; *Trabue v. Willis*, *Id.*, 584.

Besides, it is doubtful whether the mortgagee could maintain its lien in this case because of its equivocal language and conduct, as a result of which the mortgaged property was seized by the sheriff under the general creditors' bill, to which the mortgagee was the most active and the principal party. It is probable that its failure to refer to its mortgage of this property and thus exclude it from the general prayer for an attachment to be levied on "all the property of the Vulcan Works, * * * and all other property and estate belonging to said Haselton & Harrison," would be regarded as a waiver of its mortgage lien under such a bill as this.

It results that the mortgaged property will go with the other property attached for the just benefit of the general creditors, and among their claims will be included the mortgage debt which is set up by petition in the leading case.

Fourth. Next in order and first in importance and difficulty, is the question of the validity and sufficiency of the warehouse receipts to hold the bar iron, nails and spikes against the claims of attaching creditors.

This is somewhat simplified by noting *in limine*, that Lowe is reported by the Referees to be a ware-

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houseman, and the receipt holders to be *bona fide* holders for value, and, there being no exception on these points, they must be taken as conceded.

The objections of the attaching creditors to the warehouse act of 1879, that it violates Section 17, Article 2, of the Constitution, are not well taken. Its title is: "An act to define warehousemen, to regulate their duties, and to affix penalties for the violation thereof, and relating to their receipts." It does not "embrace more than one subject," and that is plainly "expressed in the title": *Monell v. Fickle*, 3 Lea, 79. It does "repeal a former law," and to make the repeal effectual and constitutional, it "recites in its caption, or otherwise, the title or substance of the law repealed," as follows:

"Sec. 8. Be it further enacted, that chapter 94 of the public acts of 1875, entitled, an act to define the rights and duties, and regulate the liabilities of warehousemen and factors, be, and the same is hereby repealed."

This recital of the title of the act repealed in the body of the repealing act is sufficient: *State v. Gaines*, 1 Lea, 735.

This act provides that any person who shall receive in store for hire, or undertake to receive, take care of and sell for other persons "any description of personal property," shall be a warehouseman; that no receipt shall be issued for the property unless it shall be at the time of issuing the same in the custody and under the control of the warehouseman and in store, or upon the premises; that he shall retain the

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custody and control of the property covered by receipt until the receipt for the same be surrendered and cancelled; that warehouse receipts shall be negotiable by written endorsement and delivery, as bills of exchange and promissory notes, and the *bona fide* holder thereof shall be deemed and taken to be the absolute owner of the personal property therein specified.

Under this act Lowe, as hereinbefore stated, received from Haselton & Harrison into his custody and control as warehouseman, large quantities of bar iron, spikes and nails, stored the same for hire in the warehouses and on the premises of Haselton & Harrison (adjacent to their mill and works), occupied by him for that purpose, and, as fast as received, gave them receipts of which the following is a sample:

S. B. LOWE,

PIG-IRON, STORAGE AND COMMISSION.

APRIL 30, 1880.

I hereby acknowledge to have received from Haselton & Harrison this day, and will deliver free on board car at my yard to ————— or order, only on the surrender of this certificate and the payment of all charges thereon, 50,000 pounds bar iron. This iron is represented to have been made at Vulcan Works, located in Hamilton county, State of Tennessee, and classified as follows: Assorted; but no responsibility is assumed except as to weight.

Charges as usual.

S. B. LOWE, *Proprietor*.

These receipts Haselton & Harrison, by their manager, Stone, endorsed and delivered to various parties as collateral security for loans or for pre-existing debts, and the iron, nails and spikes in store with Lowe at the filing of the bill, did not greatly exceed the amounts covered by these receipts. Such surplus Lowe claimed, to pay warehouse and factorage charges and

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repay advancements made by him to Haselton & Harrison, and replevied all the iron, nails and spikes taken out of his custody under the attachment, giving the warehouse receipt holders as sureties on his bond for \$17,000, the amount of attachment debts levied on said warehouse property, and the agreed value of the same. The contention for the property, therefore, is solely between the attaching creditors on the one side, and the warehouseman and receipt holders jointly on the other; and the report and exceptions thereto open for decision all questions embraced in the controversy, except the character of Lowe's possession and the *bona fides* of the receipt holders.

What, then, under our warehouse statutes, are the rights of these *bona fide* creditors holding receipts of a warehouseman to the goods in the custody of the warehouseman attached by other creditors? By the terms of the act, such receipt holders are absolute owners "of the * * * personal property therein specified;" and under this act they claim all the property in Lowe's custody seized under the attachments. The attaching creditors resist this claim upon grounds now separately to be examined.

1. They say the property attached was not described or specified in the receipt.

2. If it was, it had never been in possession of Lowe, but was always in that of Haselton & Harrison, the debtors.

3. If the property described in the receipts had ever been in Lowe's possession, it had been so exchanged by loans, sales and substitution as no longer

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to be susceptible of identification; and this being done by the warehouseman as agent of the receipt holders, whether with or without their knowledge or express authority, they must bear the loss consequent upon his conduct of the business.

1. The property is "specified" in the receipt as 50,000 pounds assorted bar iron, made at the Vulcan Works in Hamilton county, Tennessee, and received by Lowe. The iron was all deposited in bulk—the only separation being into sorts and sizes, and it is not pretended that the particular iron for which any receipt was given could have been identified by this description, or indeed in any other manner. Delivery according to the promise made in the receipt, could only have been made to the holder thereof out of the bulk of iron in the warehouse, as it was there racked up according to sorts and sizes.

The receipts for the nails, spikes and pig-iron are no more definite, and the identification there also was impossible. Therefore the attaching creditors insist and the Referees report, that the receipts are so vague and indefinite that no title passed to the holders, the argument being that a warehouse receipt must so particularly describe the property as to enable the holder to maintain trover or replevin for it, else it will not pass title; while for the receipt holders it is contended, that no such description or identification is necessary, inasmuch as this rigorous rule of the common law has been modified to meet the necessities of modern commerce for warehousing and storage, so as to facilitate the pledging and sale of property stored

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in the capacious warehouses and gigantic elevators now used in this country.

It is doubtless true that such modification has been introduced by the court in accordance with the usages and necessities of trade: Jones on Pledges, sec. 317, and cases there cited. And in regard to such property as grain this may be regarded as the settled law of the land. Indeed, so much is this practice favored that in the case of *Bank v. Hibbard*, 48 Mich., 118, (opinion by Judge Cooley), it was held that "a warehouseman, having in store wheat of his own, may effectually pledge part of it to secure his own debt by his warehouse receipt, and without separating the wheat from the mass." The effect of this is that the holders of the warehouse receipts are tenants-in-common of the mass. "But," says Mr. Jones, *Id.*, 318, "this exception to the general rule embraces only such property as grain, which is customarily stored in bulk, or other goods, the constituent particles of which are alike and not distinguishable." And he cites *Gardiner v. Suydam*, 7 N. Y., 357, for authority that it does not extend to flour in barrels, even though of the same brand and quality and of uniform value; and *Ferguson v. Bank*, 14 Bush, (Ky.), 555, to exclude such property as hams, and *Stewart v. Phoenix Insurance Company*, 9 Lea, 104, to exclude bales of cotton from the operation of this liberal rule of modern commercial law.

Gardiner v. Suydam arose in 1844 between the holder of a warehouse receipt for money advanced on flour deposited to be forwarded in the opening of

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canal navigation and a purchaser of a part of the flour in the warehouse at that time, and is properly digested as follows: "Where a warehouseman receiving flour for shipment gives receipts from time to time for the quantity in store not previously receipted to be delivered to the owner's factor, upon which the factor accepts the owner's drafts, no title to the flour receipted passes unless it was actually separated from the mass by a delivery, or by some mark or designation by which it could be specifically known.

"The effect of the receipt in such a case is to give the factor a right to demand from the receiptor the delivery of the flour."

We have not access to the Kentucky case to know the exact question decided.

In the Tennessee case the contention was between the warehouseman and the holders of a receipt for "forty bales of cotton with various marks," received of A. J. Vaughan & Co., and the points ruled were: First, that a warehouse receipt is a written contract not variable by parol testimony; and second, that the warehouseman is estopped as against the receipt holder to deny the possession of the articles mentioned in the receipt, the court expressly declining to make any ruling on the sufficiency of parol identification of the particular cotton embraced in the receipt.

We do not regard this case as settling in our State the extent of the exception to the old rule of description in warehouse receipts, and certainly cannot say from it that a portion of such articles as bales of cotton, kegs of spikes or nails, pig-iron and bar-

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iron in bulk, with other articles of the same kind, may not be sold and title passed without their actual separation from the rest, or their being so described in the receipt as to be susceptible of exact identification. Indeed, in the case of bar-iron and pig-iron, kegs of spikes and of nails, no good reason appears for refusing to the owner the same facilities of commerce and trade that are allowed to grain dealers.

However the case might be, if the question were between a receipt holder and a purchaser, as in *Gardiner v. Suydam*, in this case, since the contention is between the warehouseman and receipt holders claiming in common on the one side, and the attaching creditors on the other, and since the creditors as against *bona fide* receipt holders, can have no higher right than the debtors, and the warehouseman is estopped from denying the possession of the articles mentioned in his receipts, and the debtors had delivered them to him, and passed the receipts for them to the present holders for value, and so could not reclaim the property, we hold that notwithstanding the vagueness of the description contained in the receipts, they are sufficient to enable the receipt holders to claim the iron they represent which was in the hands of Lowe as warehouseman.

To hold otherwise would be to make him personally liable to the receipt holders for the amount of their advances, and at the same time take out of his possession the very property on account of which the liability was assumed, and turn it over to other creditors. This would be little short of judicial rob-

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bery, and would operate to suppress the business of warehousing in our State. The validity of a pledge, and the right that accompanies possession, would be entirely disregarded in such a decision.

2. But it is said the property was not in the possession of Lowe, but of the pledgeors, Haselton & Harrison, and therefore the warehouseman gave the receipts in violation of law, and must himself take the consequences.

It is true that the warehouse and yard, where the property was kept, were at the Vulcan Iron Works, and it was not generally known that Lowe was using them; but it was commonly supposed that all the iron, nails, etc., there were the property of Haselton & Harrison; and the failure of Lowe to pay rent for the warehouse, or to make known his occupancy of it by some sign or token, casts suspicion upon the dealings between him and the manufacturers, and gives color to the charges of fraud and collusion made by the attaching creditors, though it nowhere appears that the fact of Lowe's possession was actually concealed, or the fact of the pledge of the property denied, either by Lowe or manager Stone, or any one for them, and that any party inquiring was misled or deceived thereby. But it is too plainly proven to admit of doubt that whatever were the appearances or the suppositions of workmen or creditors as to the possession of the property in dispute, it had been actually delivered to and received by Lowe, who had a clerk there at the warehouse and yard taking care of the property, who carried the keys of the doors,

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and without whose permission or consent the pledged property was not interfered with. In short, the actual possession was in Lowe; the property was in the warehouse or on the yard when the receipts were given, and they are not invalid for the want of possession by the warehouseman and consequent authority to issue them. Placing goods in a cellar of the warehouse of the pledgeor, hired for the purpose by the pledgee, has been held a sufficient delivery: *Sharp v. Philadelphia Warehouse Company*, 9 Rep., 572.

The evidence of separate possession and custody is much stronger in the present case. In the Michigan case above cited, and in other cases, the right of a warehouseman to issue receipts for his own property in store, has been sustained, and the title held to pass thereby, as against all parties, to the receipt holders; and that too without registration of the receipt. But the present case does not require us to carry the doctrine to that extent. It is sufficient that the property was in the possession of the warehouseman as that of the pledgeor; the receipt holders have therefore a right to it.

Third. It is insisted that Lowe's manner of dealing with the pledged property has deprived the receipt holders and himself of any claim to the property; and that as the mortgage of merchandise was void for want of possession of and mode of dealing with the property, so also are the warehouse receipts for the same reason and upon the same authority.

This argument ignores the fundamental difference

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between a mortgage and a pledge, and the still more important difference in fact, that while the stock of goods mortgaged remained in the possession of the debtors, the iron and nails pledged were in the possession, not of the debtors, but of the warehouseman; and its conclusions cannot therefore be accepted. Yet the question remains: What was the effect of Lowe's permitting manager Stone to take out of the warehouse and yard lots of iron and nails to fill special orders on promise to return a like amount in quantity and value as soon as made, which promise seems to have been observed and kept by him? Did that release all the iron from the receipts, or, in other words, deprive the receipt holders of their title to all the iron, nails, etc., in the warehouse? This can hardly be asserted with seriousness. But it is urged with force that as the iron allowed to be taken out was the property of the receipt holders, they must look to that for their indemnity; and that substituted was not embraced in the receipts, some indeed being placed in store after the giving of the last receipt, and hence the receipt holders have no claim to it, and the attaching creditors may hold it; and if it cannot be separated from that covered by the receipts, then they may take it all, and Lowe must be the loser for mixing it. How this might be as between receipt holders and purchasers, here again we need not determine; nor what would be the rights of the parties if the promised substitute property had been seized before delivery to Lowe. The question is: Who has the superior right to this sub-

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stituted iron, the receipt holders or the creditors attaching after it went into the custody of the warehouseman?

We think it plain the right is in the receipt holders: Colbrooke on Coll. Sec., sec. 420. By force of the statute the title to the property represented by these receipts was in them. The transaction by Lowe was in effect a loan of the iron. It was without the authority of the receipt holders, and if the loan had not been repaid they could have looked to Lowe for the value of the iron. It was returned by manager Stone and by Lowe replaced in lieu of that borrowed, and so was in his actual custody. This inured to the benefit of the receipt holders, and they have the right to ratify and adopt this unauthorized act of Lowe. They have exercised this right. And since no right of another party had intervened between the loan and the return of the iron, the receipts must be held to cover and protect the substituted iron as they did that for which the substitute was given. This, of course, would not include the property which was placed in the possession of Lowe without his knowledge or consent on the night before the levy, and which he refuses to make any claim to. This the attaching creditors have secured by their levy.

Fifth. The objection that the receipts were not registered can avail nothing. Such papers do not require registration. Possession by the pledgee or warehouseman is sufficient, and is a substitute for registration: *Crisp v. Miller*, 5 Heis., 697.

Sixth. Nor do we see that any of the receipt

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holders, as insisted, have taken such steps in the proceeding as to waive or abandon their rights in the premises within the rules recognized by our decisions, which require an exhibition of a definite intention to abandon a right before the same will be decreed (*Masson v. Anderson*, 3 Bax., 304), and allow a pledgee a choice as to the method of enforcing his right: *Arendale v. Morgan*, 5 Sneed, 716.

Seventh. The Referees report the transactions between Lowe and manager Stone to be, if not fraudulent in fact, at least of so questionable a nature as to repel Lowe from any benefit thereunder; and so these transactions seem to us. And if Lowe were here seeking the active aid of a court of equity, we might hesitate to grant him aid or relief. But that is not the case. He stands here as a defendant in possession maintaining his legal rights. The property had been placed in his custody as warehouseman. He had incurred expenses and made advances upon it on the faith of the actual possession. It matters not, that no written evidence of the transfer was given, nor even that an inventory was not kept of the property. These have been held non-essential to the validity of such a transaction: *Hurst, Purnell & Co. v. Jones*, 10 Lea, 8.

He relies upon his possession and resists the efforts of the attaching creditors to take custody of the property until the debts of the receipt holders and his own are paid, and alleges that the pledged property is not of value sufficient for these purposes.

Lowe's defense seems impregnable. His conduct

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may have been suspicious. He may have favored these failing debtors and allowed them unusual privileges, whereby they were enabled to float along after they had reached the point of insolvency; and thus others may have been led to trust them when they were not solvent. But he did not guarantee their solvency, nor did he make false representations to any of the attaching creditors whereby they might hold him liable for their losses, or be estopped to claim the property in his possession. And we know of no power in a court of equity to decree a forfeiture of title to property in possession because merely of the suspicious conduct of the possessor. The law gave Lowe the right to hold enough of the property in his custody as warehouseman to indemnify himself against all valid claims of holders of his warehouse receipts; to reimburse him for expenses incurred and advances made on the faith of the property stored with him; and also to pay his warehouse charges and his compensation for services as factor; for such was the contract of bailment. His account, fully stated and filed under oath, has not been successfully impeached in any of its items, and we must therefore take it for correct, and allow him to retain the property for it, as well as the receipt holders.

Eighth. It is argued for the attaching creditors that they have a prior right to the proceeds of the debts of the Alabama & Great Southern Railway over Lowe, who claims them by assignments made respectively May 25 and 26, while the attachment was levied June 1, 1880.

This claim for priority is based upon the assertion,

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first, that Stone was not manager at the date of the assignment, and had no authority to make it; and second, that notice of the assignment had not been given to the debtor and the same perfected at the date of the attachment levy.

The proof does not sustain either assertion. Stone's general authority as manager had not terminated when the assignments were made. And although notice of the assignment did not reach the office of the secretary of the company until June 4, three days after the attachment, it was duly given to the resident purchasing agent, who made the debts on the 26th of May, five days before the attachment was levied. We are of opinion that notice to this purchasing agent was notice to the company, and the assignment thus perfected before the levy of attachment fixed a priority of right in the assignee over the claim of the attaching creditors.

The result on the whole case is, that the report of the Referees is set aside, and the decree of the chancellor affirmed with the modifications rendered necessary to conform it to this opinion.

The proceeds of all the property seized under the various attachments sued out by parties to the general creditors' bill, saving of course that in Lowe's custody, will be *pro rated* among all the creditors who are parties to the bill, and upon all their valid debts presented therein, whether due or not, without preference to any of them, either because of their asserted liens as workmen or as holding separate attachments under the general creditors' bill.

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The bills of those parties impeaching the general creditors' bill and the proceedings thereunder, will, in that aspect, be dismissed; but they will be allowed recoveries against the debtors; and wherever they have by attachment obtained liens upon any of the debtors' property other than that in the custody of Lowe, or that seized under previous attachments, they may, by decree, subject the same to the satisfaction of their recoveries; or if already sold, they are entitled to the proceeds thereof.

The costs of this court will be paid in equal parts by the appellants and their sureties, that is one-fifth each, by the complainants in the following bills: Ward & Hamill and others, No. 2480; C. A. Moross and others, No. 2482; Wason Car and Foundry Co. and others, No. 2484; W. G. Lewis and others, No. 2486; Crutchfield & Co., No. 2489.

The costs of the general creditors' bill in the chancery court should be paid entirely out of the fund in that case; and if any thing yet remains of this fund, after paying the costs and claims in that cause, the same will be paid on the claims of the other creditors in the order of their attachments levied on the property producing this fund. The other costs of the chancery court will also be paid as decreed by the chancellor.

The cause will be remanded to the chancery court for the execution of the decree in accordance with this opinion.

Railroad Company v. Conner and Wife.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAIL-
ROAD COMPANY v. DANIEL D. CONNER and WIFE.

RAILROADS. *Passengers entitled to safe place to alight from train.* A station being called by the conductor of a railroad train, and the passenger told to get off, there being no light or assistance offered, had a right to rely upon the directions of the conductor, and to presume that he was at the usual place of getting off, and that there was at that place a safe and suitable place to alight from the train.

FROM WASHINGTON. \

Appeal in error from the Circuit Court of Washington county. NEWTON HACKER, J.

W. M. BAXTER and JOHN ALLBON for Railroad Company.

I. E. REEVES, S. J. KIRKPATRICK and H. H. CARR for Conner and Wife.

COOKE, J., delivered the opinion of the court.

This action was for wrongfully and oppressively causing the plaintiff, Mrs. Conner, who was a passenger upon the defendant's cars, to leave the train in the night time and when it was very dark, at an improper and dangerous place, at a considerable distance from the depot and regular place of discharging passengers at the station where she was to get off, and in thus leaving the train, while in the exercise of due care on her part, she fell and was greatly injured, etc. There was a verdict and judgment for the plaintiff, and the defendant has appealed.

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There was proof tending to show that the plaintiff was a passenger upon defendant's train from Jonesboro to Johnson City; that about four o'clock, A. M., when the train was approaching the latter station, the signal for the station was sounded, the station called by the conductor, who, just as the train was stopping, and before it had stopped, told the plaintiff, who was alone, to get off, if she was going to get off; whereupon she got up, being but two seats from the door of the car, the conductor opened the door and just as she got to the door, the train started; as she stepped out upon the platform of the car, the conductor stepped inside and shut the door; it was so dark that she could not see any thing, and she descended as quick as she could to the lower step and jumped off; that she was excited when she saw the train was moving, and jumped off as quick as she could to save herself, as she states; that at the time she jumped the train was moving as fast as a man could walk "brisk;" the train was stopped but a moment, she arose immediately when the conductor told her to get off if she was going to, and did get off as fast as she could; that there was not time for her to have possibly got off, after she was so told by the conductor, before the train started; that she could not see the ground where she jumped off; and that it was in a rough, uneven and dangerous place, between two tracks; and that she fell upon the ends of the cross-ties and was seriously injured. The place was about four hundred yards from the platform at the station where passengers are usually landed, and

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the train was flagged down at that place because of the rear cars of a passing freight train being upon the main track. There was no light where she jumped off, nor did those in charge of the train render her any assistance, or give her any warning after she was told to get off, when the train was started before she had time to do so.

We are satisfied there is sufficient evidence to sustain the verdict, under the rule of this court, and the only question for consideration is as to whether there is any reversible error in the charge of the court.

Various errors have been assigned and insisted upon by counsel for the plaintiff in error. The following, however, we think, the one that requires serious consideration. His Honor, among other things, charged the jury as follows: "Railroad companies, through their agents and employes, are required to notify passengers of their arrival at stations, and when such notice is given, passengers have a right to act upon such notice and alight, if the train stops. But a passenger would not be authorized to alight from a train while in motion, even at a station, if the motion of the train should be such as to render such passenger liable to suffer serious injury in attempting to alight. If a passenger, on nearing a station, to which he or she is bound, is notified by the railroad employes of his or her arrival at such station, and if, in attempting to alight, such passenger shall find such train still in motion, and at such rate of speed as to make it apparent that he or she would run great risk of being injured in alighting, or attempting to alight,

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then such passenger would not be authorized to alight, and if such passenger should, under such circumstances, step off or jump off and be injured in so doing, such passenger could not recover for an injury so received, notwithstanding the station may have been announced by the railroad employees."

This charge, it is insisted, is erroneous, inasmuch as it leaves the jury to understand that a passenger who steps or jumps from a moving train and is injured, is entitled to recover unless it should appear that the motion of the train was such as to render such passenger liable to suffer *serious* injury thereby, or would run great *risk* in doing so, and that a passenger may step or jump off a moving train under such circumstances as would prevent his recovery for injuries received thereby, although it might not appear that the motion of the train was such as to render him liable to suffer *serious* injury thereby, or that he was running great risk in doing so. This, as an abstract proposition, may be true. But his Honor had, as we think, properly charged the jury in regard to the duty of the defendant to provide safe and suitable places for passengers to get on and off its trains at its regular stations, and its duty in stopping at the usual places of getting on and off, and giving passengers when stopped, reasonable time to get off before starting the train, and of the right of the passenger, when the station was called and the train stopped, to presume it was at the usual and proper place to get off, and that it was safe to do so, and of the facilities required to be afforded passengers for leaving the

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train. He had also properly instructed them that a passenger injured by getting off a moving train when the defendant was in no fault, could not recover. And he proceeded to instruct them that a passenger, in getting off a train, was required to exercise his senses for his own preservation. He also charged them in relation to mutual or contributory negligence, that if both parties were guilty of some negligence, if the negligence of the plaintiff was the proximate and efficient cause of the injury, she could not recover, but if the defendant's negligence was the proximate and efficient cause of the injury, it would be liable; but in such case the negligence of the plaintiff should be taken into consideration by them in mitigation of damages. This has been the established law in Tennessee since the case of *Whirley v. Whiteman*, 1 Head, 600.

We think the charge, when all taken together, although not framed with strict legal accuracy, does not contain any positive error for which the cause ought to be reversed, especially as we think we can see the defendant has sustained no injury by it.

In the earlier cases it was held that jumping or alighting from a train while in motion, unless impelled by immediate danger, was negligence on part of a passenger, and in jurisdiction where contributory negligence defeated the action, a plaintiff who did so and was injured, was not permitted to recover. But in courts where this principle still prevails, the rule has been modified: *Thompson on Passengers*, 227, and authorities cited. And doing so under certain circumstances, has been held not to be even contributory negligence. In

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this State, where the rule above cited, in relation to mutual negligence prevails, there is no room for its application.

The jury, we think, were warranted, from the proof, in the conclusion—and there was certainly evidence upon which it could rest—that the train was stopped in a rough and dangerous place to alight from it; that the station was called by the conductor and the plaintiff told by him to get off; that he opened the door to let her out, and left her on the platform of the car in the dark, when the train was beginning to move off, without affording her either light or assistance, and without warning her of the danger or requesting her to desist, when he saw the car was in motion after he had directed her to get off; and that the train was not stopped a sufficient length of time to allow her to get off before starting; that she was excited by the situation in which she was placed, and in the darkness and confusion, seeing the train was moving off, jumped from it upon the impulse of the moment. It being so dark that she could not see, and the station having been announced, the train stopped and she told by the conductor to get off, she had a right to presume that she was at the usual place of getting off, and that there was at that place a safe and suitable place for her to alight from the train: *Cartright v. Chicago & Grand Trunk Railway Company*, 52 Mich., 606, published in American Reports, vol. 50, page 274, and notes and authorities cited; Rorer on Railroads, 1117. She had also a right to rely upon the directions of the conductor, and

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to presume it was safe to alight from the train in accordance with his directions: Rorer on Railroads, 1092.

With a safe and proper place to alight, and the train moving at the speed a man would walk at a brisk gait, the probabilities are strong that she would not have been injured, and we are satisfied that the jury were warranted in the conclusion that it was the first and more gross negligence of the defendant that was the proximate and efficient cause of the injury. It is evident they predicated their verdict upon this conclusion, and that they considered the plaintiff was also guilty of negligence, which they weighed against her in assessing her damages, as they only found a verdict for five hundred dollars, although her injuries are shown to be serious and permanent.

The special charges requested by the defendant, under the facts of the case, should not have been given, and were properly refused.

It is also urged that the court erred in charging the jury upon the subject of vindictive damages, as there was no testimony to justify a charge upon this subject. Whether or not this is so is unnecessary to consider, as it is perfectly certain that such damages formed no part of their verdict. It is unnecessary to notice the other objections to the charge further than to say, that we do not consider any of them tenable.

We are satisfied with the result of the case and affirm the judgment.

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THE EAST TENNESSEE, VIRGINIA & GEORGIA RAIL-
ROAD COMPANY v. J. J. HUNT.

1. *RAILROADS. Freight. Damage.* A railroad company is not entitled to demand or receive either freight charges or demurrage until it is in a condition to tender a delivery of the goods at a convenient, safe and uninterrupted point at its depot. The legal effect of its undertaking is to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. After notice it may require prompt action on the part of the consignee, but he may demand of it free, convenient, safe and undisturbed access to his goods.
2. *SAME. Same. Tender.* A consignee who is ready to pay freight for the goods, on a refusal to deliver them, may maintain trover for the goods, there being no other legal claim upon them, and he is not bound first to make a legal tender of the freight.
3. *SAME. Demurrage. Lien.* A railroad company has no lien upon goods for demurrage in absence of contract.

FROM WASHINGTON.

Appeal in error from the Circuit Court of Washington county. NEWTON HACKER, J.

W. M. BAXTER and JOHN ALLISON for Railroad Company.

H. H. INGERSOLL and C. E. DOSSER for Hunt.

TURNEY, J., delivered the opinion of the court.

On April 17, 1884, there arrived over the East Tennessee, Virginia & Georgia Railroad, at Jonesboro, a car load of stoves, etc., consigned to defendant in error. The goods had been received by the "Old

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Dominion Steamship Company," and shipped April 11, *via* Norfolk. The bill of lading provides: "All articles named in this bill of lading are subject to charges for necessary cooerage and repairs."■

"The several carriers shall have a lien on the goods specified in the bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods."

"The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery; and if not taken away within twenty-four hours after their arrival, may, at the option of the delivering company, be sent to a *warehouse*, or be permitted to lie, when landed, all at the expense and risk of the shipper, owner or consignee."

It was three or four days before the car was placed at the point for unloading, and when this was done, and the consignee sent hands to unload, the agent refused to unlock the car because the freight had not been paid. The consignee offered to pay the freight once or twice, but the company would not place the car in position to be discharged of the goods, because the company claimed damages of \$2 or \$2.50 per day on the cars, of which payment was refused. After the first refusal to unlock the car it was removed from the place for unloading, and not returned.

Under any state of facts, in the absence of agreement to the contrary, the company was not entitled to demand or recover either freight charges or demurrage until it was in condition to tender a delivery

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of the goods at a convenient, safe and uninterrupted point at its depot or on its road. The legal effect of its undertaking was to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. If it requires the consignee to remove the goods in a limited time, it must do all in its power to enable him to do so, while it may, after giving notice of the receipt of the goods, require prompt action on the part of the consignee, he may demand of it free, convenient, safe and undisturbed access to his goods.

On May 5, 1884, Hunt commenced this action of replevin for the stoves, etc. The company admits the tender, but insists it was not pursued by bringing the money into court, and therefore the action must fail.

Redfield, in volume 2, page 186, of his work on Railways, states the rule to be: "The consignee who is ready to pay freight may maintain trover for the goods on a refusal to deliver them, there being no other legal claim upon them; and he is not bound first to make a formal tender of the freight." We think the rule a sound one; without it it would be in the power of common carriers to retain goods for purposes wholly disconnected with the carriage of the goods, and when sued for them, to defeat the owner because the money is not brought into court, and retain the goods until a debt due for another consideration is paid. There can be no good reason why a tender of the amount due does not at once entitle the owner to the possession of his goods. If it shall

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turn out the common carrier is the loser, his loss is the consequence of his own wrong in not receiving his own when it was offered to him. Why should he, because he may think the law gives him a lien for another claim, but in which he is mistaken, be permitted to force the consignee to litigate with him to the point of convincing him of his mistake, and when he has discovered it, say to the consignee, "I have wrongfully witholden your goods; the law was with you, and I violated it, but you have failed during the litigation to keep the money constantly in court, and be without its use, therefore, through my wrong, you must fail to recover your goods." It is a sound rule, that when one of two innocent persons must suffer, he who brought about the injury must sustain the loss. In this instance the plea of the company can only be that it mistook the law.

It is next argued that the company has a lien for "demurrage." The goods remained in the car from their arrival till replevied, and for this a demurrage of \$2.50 per day is claimed, with a lien upon the goods. In his work on Sales, page 738, section 796, Mr. Benjamin defines a lien to be, "A right of retaining property until a debt due to the person retaining it has been satisfied," and adds, "but this lien extends only to the price." If, by reason of the vendee's default, the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, if any, is personal against the buyer. In *Somes v. The British Empire Shipping Company*, it

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was held by the unanimous judgment of the Queen's Bench, the Exchequer Chamber, and the House of Lords, "that a ship-builder, who kept a ship in his dock after repairing her, in order to preserve his lien, had no claim at all for dock charges against the owner of the ship for the time elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default." There is no difference in principle between the case at bar and that cited. 2 Redfield on Railways, page 206, section 191, defines demurrage to be "a claim by way of compensation for the detention of property which is subsequently restored."

The detention here was by the railroad company. It not only kept its own but the plaintiff's property; therefore it cannot complain of "demurrage," or claim damages therefor. On same page, sub-section 3, Mr. Redfield says: "A railway has no lien for the compensation impliedly due them for the detention of their cars an unreasonable time in discharging the cargo, the cars remaining during the time in a public highway." Here the car did remain not only in a public highway, but at points not adapted to its convenient discharge, and not at places at which it was usual to discharge cargoes.

To adopt the argument of counsel, and construe the word "charges" in the bill of lading to include demurrage, would be to add to a written undertaking, prepared by the common carrier, purporting to contain every condition and restriction under which it undertook to convey the goods, and by its term confining

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the term "charges" to cooperage and repairs; also, to further enlarge the terms by substituting the car in which the goods have been shipped for a warehouse, the carrier having provided that, in case of delay in unloading, it might place the goods in a warehouse at the charge of the consignee.

The charge of his Honor, the circuit judge, is correct on the only two questions arising in the case. The exceptions of plaintiff in error are disallowed, exceptions of defendant allowed, the report of the Referees rejected, and judgment affirmed.

HANCOCK COUNTY v. HAWKINS COUNTY.

1. **STATUTES. Publication.** An act of the Legislature properly passed and regularly approved, does not become invalid by reason of a failure to publish the same among the acts of the Legislature.
2. **COUNTY LINES. Estoppel.** By an act of the Legislature a portion of Hancock county was added to Hawkins county, the line running within eleven miles of the county site of Hancock county. *Held*, upon bill filed by Hancock to restore the territory that complainant was not estopped by mere lapse of time, in ignorance of the fact that there was an encroachment upon the constitutional limits of Hancock county.
3. **SAME. Revenue.** Since the passage of the act, until the filing of the bill, the revenues collected from said territory belong to Hawkins county, said territory being within the jurisdiction of Hawkins county.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H.
C. SMITH, Ch.

Hancock County v. Hawkins County.

F. M. FULKERSON and W. P. GILLENWATERS for complainant.

A. D. HUFFMASTER for defendant.

COOKE, J., delivered the opinion of the court.

On December 15, 1871, the Legislature passed an act, changing the lines between various counties, by the sixth section of which the line was changed between the counties of Hancock and Hawkins, by which a portion of the territory of Hancock was attached to Hawkins county. By some oversight this section was omitted from the act as published in the printed acts of that session. By a resolution of the called session of the Legislature of 1872, it was directed that the act, as passed, containing said sixth section, should be published along with the acts of said called session, which was done.

Immediately after the passage of said act of December 15, 1871, Hawkins county took possession of said territory embraced therein, and has continued ever since, up to the filing of the bill in this cause, to control and exercise jurisdiction over the same. Upon Hawkins county assuming jurisdiction over said territory, the county court of Hancock immediately reorganized and readjusted its territory to conform to the change made by said act, the officers of Hancock county being fully cognizant of the passage of said act ever since its date, and of the change of territory made thereby. All of the territory embraced in said change is within less than eleven miles of the

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county site of Hancock county, and the change encroached upon the territory of Hancock county to within less than eleven miles of the county site to the extent of all the territory thus taken from Hancock county. Hancock county is the younger county, was formed out of territory taken from Hawkins county, and if the line of Hancock county is restored, as it existed before the passage of said act, it will fall within less than eleven miles of the county site of Hawkins county. Hancock county was organized in 1840.

This bill was filed in 1880, attacking the validity of said act on the grounds that it was not passed by the Legislature in conformity with the requirements of the Constitution, inasmuch as the subject was not embraced in the Governor's call of the extra session of the Legislature; it being assumed that the action of that session of the Legislature, directing its publication, was necessary to give validity to said section of said act; and also upon the ground that the act was in violation of Article 10, section 4, of the Constitution of Tennessee, and sought to have said territory restored, and an account of the revenues collected by the respondent county from said territory since the passage of said act, and a decree for the same.

The answer admits the territory thus taken off Hancock county, and attached to Hawkins by said act, is all within eleven miles of the county site of Hancock county, denies that said act was not passed by the Legislature in conformity with the requirements of the Constitution, and insists that although

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the constitutional limits of the county of Hancock have been encroached upon by said act by approaching within less than eleven miles of its county site, the complainant is estopped, by reason of its long acquiescence in said change of its line, from now asserting any right to the territory thus taken away from or having the same restored to it. It also pleads and relies upon the statute of limitations of 1819 of seven years' actual adverse possession of said territory, and denies any right of complainant to an account of the revenues, etc., collected by it.

The answer was also made a cross-bill, and averred that, by the original act creating Hancock county, its own territory was encroached upon in violation of the same act of the Constitution, by approaching within less than eleven miles of its county site, and that all of said territory embraced in the change of the line complained of is within less than eleven miles of the county site, and seeks to be decreed entitled to the same by virtue of its original constitutional right, and the violation thereof in the original organization of said county of Hancock, and to be restored to its original territory to the extent of eleven miles from its county site.

The cross-bill was demurred to, and the demurrer sustained, and the cross-bill dismissed, which was affirmed on appeal to this court at a former term, and this part of the case is now *res adjudicata*.

As to the first question, in regard to the mode of the passage and publication of the act, it appears that the act was properly passed by the Legis-

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lature and approved by the Governor, containing said sixth section, on December 15, 1871, and the publication of the sixth section was omitted by mistake. The act was therefore complete and valid, and by the seventh section took effect from its passage. The failure to publish the sixth section could not affect its validity. The resolution of the extra session of the Legislature was merely directory as to its publication, and whether authorized by the Governor's proclamation calling said extra session or not, was no part of the passage of said act, and it was the duty of the State officers to publish it just as it was passed, without any direction from the Legislature at its called session.

A more serious question is, as to whether or not Hancock county has waived or abandoned its right to have this territory in question restored by reason of the length of time it acquiesced in said change without complaint; or is estopped by such acquiescence from now, asserting the same, it having been between eight and nine years from the time of the passage of said act and filing of the bill in this cause, there being no question as to the unconstitutionality of said act by reason of the encroachment upon the territory of Hancock county: 5 Sneed, 490; 9 Hum., 585; 1 Swan, 236; 4 Baxt., 593.

The bill avers that the fact was unknown to the county court of Hancock county, or its officers, that the change made in the line between said counties by the sixth section of said act, did approach the

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county site of Hancock county within less than eleven miles, until it was ascertained by an actual survey made but a short time before the filing of the same. This averment is denied by the answer. The depositions of two of the members of said county court, who have been justices of the peace and members of said county court ever since the war, and one of them chairman thereof for a great many years, were taken. Both of these testify that they never knew that said disputed territory was within eleven miles of the county site until it was ascertained by said survey, and from circumstances and the declarations of the other members of said court, they are satisfied that none of them knew the fact until it was thus ascertained. This testimony is objected to as incompetent. There can be no question as to its competency, so far as these members of the county court themselves are concerned, and whether competent as to the other members of the court it is unnecessary to determine, as we are of opinion that it must be made to appear affirmatively, either by direct proof or from facts and circumstances, that the fact of said encroachment was known to said county court, and an acquiescence therein after such knowledge for a sufficient length of time to raise the presumption that said county had abandoned the right to reclaim said territory, or that such improvement had been made, or expenses incurred in or upon said territory by the defendant county, or other causes shown as would render it inequitable to now restore the same, and thus estop the complainant. Neither

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of which, we think, has been shown in this case. As to what length of time, with knowledge of the fact, would raise such presumption where it depends, as in this case, upon mere lapse of time, has not, that we are aware of, been determined, and perhaps could not be, as each case must depend upon its own peculiar facts and circumstances.

In *Maury County v. Lewis County*, 1 Swan, 236, it was held that acquiescence for five years was not sufficient to raise a presumption of a waiver of the right; in that case, however, it was said that the fact of the encroachment upon the constitutional limits of Maury county was unknown to her authorities until a short time before the bill was filed. In this case it appears the line where it was changed runs through a rough and mountainous part of the country, and the respondent by its answer admits that the fact that Hancock county approached the county site of Hawkins nearer than eleven miles, it being the identical same place, was unknown to Hawkins county or its officers until it was ascertained by a survey, after the bill was filed in this cause, although said county had been established forty years. We are satisfied from all the facts and circumstances of this case there has been no waiver or estoppel as to its right on part of complainant in this cause, and that the complainant county is entitled to have the territory restored to it, and the line re-established as it existed before said attempted change by said act. The statute of limitations of 1819 has no application to a case like this.

The chancellor held that the complainant was en-

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titled to an account of the taxes and revenues collected by Hawkins county from the disputed territory, while she exercised jurisdiction over the same, and decreed a recovery of the same, and the Referees have reported that his decree should be affirmed. This portion of the decree, as well as of said report, is erroneous.

The territory, during the time jurisdiction was exercised over it by Hawkins county, and not asserted by Hancock county, was *de facto* a part of Hawkins county, and the revenues collected from it were, we must presume, expended along with the other revenues of said county for its benefit as an integral part thereof, in a similar manner, if not precisely the same, as they would have been had they been collected and expended by Hancock county itself. Hence it would be now inequitable to compel a repayment of the same to Hancock county. This part of the decree will be reversed, and so far as it seeks an account the bill will be dismissed.

After the filing of the bill the revenues arising from taxes of the disputed territory were impounded and collected by a receiver appointed by the chancellor, and are now in his hands, or in the office of the clerk and master of the chancery court, or under the control of said court. This property belongs to Hancock county.

But the costs of this cause, both in this and said chancery court, will be paid out of said fund, and the remainder paid over to Hancock county.

The State v. Henderson.

THE STATE v. JOHN HENDERSON.

1. COSTS. *Justice's fee for issuance of subpoena.* A justice of the peace is allowed in criminal cases twenty-five cents for subpoenaing a single witness, and five for each additional witness.
2. SAME. *Sheriff's fee for arrest. Justice's warrant.* A sheriff or constable is allowed for arresting prisoners in another county upon a justice's warrant, fifteen cents per mile, guarding to place of trial or county jail, no expense of prisoner being allowed.
3. SAME. *Clerk's fees.* No fee is allowed clerks for copying bills of costs upon the minutes of the court.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

ATTORNEY-GENERAL LEA for the State.

W. L. LEDGERWOOD and S. R. ROGERS for Henderson.

DEADERICK, C. J., delivered the opinion of the court.

This case was brought by appeal of the Attorney-General on behalf of the State, to this court, from the action of the judge of the criminal court, upon a motion to re-tax costs.

His Honor allowed the justice of the peace twenty-five cents instead of ten cents allowed by the clerk, for the first name in the subpoena.

Thompson & Steger's Code, section 4549, sub-sections 3 and 4, allow a justice of the peace, in civil cases, for issuing a subpoena for one witness, ten cents, and

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for each additional witness, five cents. Section 4550, after specifying the fees to be allowed for certain services of a justice of the peace in criminal cases, by sub-section 8, allows for any other services by the justice, the "same fees allowed" for similar services in civil cases.

The fees allowed in the preceding seven sections specified, were such, for the most part, as are peculiar to a criminal prosecution; and the eighth sub-section, without further specification of such fees, provides for others not named, by providing that the justice shall receive for any other services required of him in criminal cases, the same fees allowed him for similar services in civil cases. Summoning witnesses is a service of this kind. It is not specified in the list of the justices' fees in criminal cases, but it is named in the list of fees he is allowed in civil cases. So it has been uniformly the practice to allow him the same fee in civil and criminal cases for subpoenas for witnesses.

That fee was increased by the act of 1871, in civil cases, to twenty-five cents for a single witness, and five cents for each additional witness. By the second section of the same act the Legislature did make a change in the justices' fees for a judgment in criminal cases, reducing it as specified in section 3 of sub-section 4550, of the Code, from seventy-five cents to fifty cents. But no alteration or modification of sub-section 8 of said section is made, and the general provision in cases not specified, that the same fees shall be allowed for any other services required

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by law in criminal cases, as are allowed for similar services in civil cases, is left in full force and operation.

We think the obvious purpose of the Legislature was to allow the same fees for similar service in civil and criminal cases. And whatever may be the fee in civil cases at the time the service is performed, determines the amount of the fee in criminal cases for similar services. There is nothing in the language of sub-section 8 to restrict the fee in criminal cases to the fee allowed in civil cases, at the time of its enactment. On the contrary, the purpose, we think, to preserve the uniformity of compensation for substantially the same service.

The holding of his Honor was therefore correct, as to this charge.

It is objected by the Attorney-General that the allowance to the officer of fifteen cents per mile for going after and returning with the prisoner arrested in another county, is unauthorized by law. This court held, in 1878, in the unreported case of the *State v. Eaton*, when the officer went to Chattanooga from Knoxville, and arrested and returned with the prisoner, that under section 4564, old Code, sub-sections 31 and 33, that the officer was entitled to ten cents per mile, but disallowed the charge of five cents per mile for the transportation of the prisoner.

Sub-section 31 provides that the officer shall, "for removing any criminal from one county to another, per mile, going and returning, ten cents." And section 33, "for carrying prisoner arrested on capias from

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one jail to another, per mile, as above, ten cents." It was held these provisions would cover the service required to be performed by the officer. If not, no compensation was provided for a service required and which might involve very considerable expenditure of money by the officer.

Probably because of the omission in the statutes of any provision for the transportation of the prisoner, the act of March 23, 1885, was passed. That act provides, "that sheriffs and constables shall be allowed to demand and receive in addition to what is already allowed for arresting prisoners on a justice's warrant, in any other county, and guarding to place of trial or county jail, five cents per mile," etc.

The Legislature obviously supposed that a suitable fee to the officer was "already allowed," and the five cents additional was intended to pay the expenses of the prisoner. This allowance of fifteen cents is therefore correct.

The only other exception taken to the action of his Honor, by the Attorney-General, is to the allowance of ten cents per hundred words for copying bills of costs on the record or minutes of the court. In support of this ruling by his Honor, we are referred to section 5301, sub-section 35, and section 6442, M. & V. Code.

By sub-section 35 of section 5301, the clerk is entitled, "for copies of any pleading, papers and proceedings in a cause, per one hundred words," to ten cents, from the person to whom, or for whom, they are furnished. But there is no statute requiring him

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to copy a bill of costs upon the minutes of the court before judgment that county or State shall pay them. But the statute does require that the clerk shall make entries upon his execution docket showing when an execution issues; to what county and office; the return, and its date; the amount received and paid out thereon, and when; and these entries of transactions are to be made at the time of their occurrence. They are original entries upon the execution docket, and not copies.

But section 6442 of the Code does provide that the costs chargeable to the State or county, in criminal cases, shall be made out so as to show the specific items and be examined, entered of record and certified to be correct by the judge and district attorney. And the next section provides that a copy of the judgment and bill of costs, certified as directed, shall be presented to the Comptroller for his warrant, etc.

These proceedings are had when the defendant is insolvent and the costs cannot be made off him. And by section 5310, a fee is allowed the clerk of seventy-five cents for entering a judgment against the State or the county, when the defendant is shown, by execution, to be insolvent. So, if the service was performed before the State was adjudged to be chargeable with said costs, there is no statute requiring its entry and no fee provided for such service, and this we understand to be the case. In this respect the judgment of the court below will be modified, and in all other respects affirmed.

Bank v. Bradley.

EXCHANGE & DEPOSIT BANK and COMMERCIAL BANK
OF KNOXVILLE v. C. W. BRADLEY *et al.*
AND
BANK OF BRISTOL v. C. W. BRADLEY *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Co-defendant. New parties.* A defendant to a bill in chancery cannot object to the action of the court in setting aside a *pro confesso* order against a co-defendant, and, with the assent of the complainant, making new parties defendant.
2. CO-TENANTS. *Lien.* If the tenants in common or co-owners of property sell their shares severally, each has only a lien on his share for his part of the purchase money.
3. ASSIGNMENTS. *Liens. Vendor and vendee.* Under a contract for the sale and purchase of land, in which it is agreed that the purchaser had advanced money to the vendor and taken security therefor in the shape of assignments of debts paid by the advances with their liens and a trust assignment of the vendor's interest in the property, with an express stipulation that the vendee may become the purchaser of the property by a given day, in which event the advances are to be credited upon and deducted from the gross amount of the purchase money, and the vendee elects to take the property, the assignments and liens and trust deed are thereby extinguished, and no creditor of the vendee could, in the absence of contract, acquire any right to the debts so assigned and their liens.
4. LIEN. *Cannot be revived after payment.* If a debt, which is a lien on realty, be once paid by the debtor, the lien cannot afterwards be revived to the prejudice of third persons by the creditor and debtor.
5. VENDOR AND VENDEE. *Contract for sale of land. Election.* Where a contract for the sale and purchase of land has been made, conditioned upon the election of the vendee to take by a given day, the vendor may waive performance to the day, and close the trade under the contract.
6. LIEN. *Not lost. When.* An express lien on land for the purchase money, retained on the face of a deed of conveyance or by the decree of the court under which the land is sold, is equivalent to a mortgage lien, and is not lost by recovering judgment upon the purchase notes, and issuing execution thereon.

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7. LIEN. *Vendor and vendee. Levy and sale.* An attachment lien on land contracted to be sold, levied on as the property of the vendee, is subject to the payment of the purchase money, and a similar levy on the land as the property of the vendor reaches nothing, he holding the legal title in trust for the vendee.

FROM WASHINGTON.

Appeal from the Chancery Court at Jonesborough.
H. C. SMITH, Ch.

JAMES COMFORT for Exchange & Deposit Bank.

W. M. BAXTER for Commercial Bank.

CHARLES R. VANCE for Bank of Bristol.

H. H. INGERSOLL for Blair's estate.

LUCKEY & YOE and J. P. EVANS for Meeks' estate.

J. B. HEISKELL for McKinney's estate.

COOPER, J., delivered the opinion of the court.

The litigation in this case is somewhat narrowed by the report of the Referees, and the exceptions filed thereto. It will only be necessary to state so much of the case as will enable us to decide the exceptions. The defendant, Evans, claims under the Blairs, and his interest need not be specially noticed.

The Embreeville Iron Works property, embracing about 40,000 acres of land, was owned by the defendants, the Blair Brothers, McKinney's trustees, and Lyle, in the following proportions: The Blairs ten and one-half twelfths; McKinney's trustees one-twelfth, and

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Lyle one-half of one-twelfth. The property was in litigation in the chancery court, and was by a decree of that court ordered to be sold. The parties interested sold their shares severally to the defendants, C. W. Bradley & Co., at the rate of \$60,000, the price of the shares of the Blairs being \$52,500; of the share of McKinney's trustees \$5,000, and of the half share of Lyle \$2,500. Bradley & Co. executed their notes for the purchase-money, dated December 31, 1869, for various amounts and falling due at different times. The notes for the McKinney share were made payable to the trustees, while the notes for the residue of the property were made payable to the clerk and master of the chancery court. The sale was reported to the court, and confirmed at the May term, 1870, a lien being expressly retained on the land by the decree of confirmation for the payment of the purchase-money. The Blairs were indebted to the McKinney trustees in a large amount, which was a lien on the share of the Blairs in the land, and, by agreement of these parties, one of the notes of Bradley & Co., being a note for \$6,916.66, given for the shares of the Blairs in the land, was assigned to McKinney's trustees, and received by them in satisfaction of their said debt, with an express provision, embodied by consent in a decree in the cause, that this note should be entitled to priority of satisfaction out of the purchase-money due from Bradley & Co. for the shares of the Blairs in the land. The Blairs were also indebted to the defendant, John F. Smith, in the sum of \$6,134.69, and the Referees find that, by a

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decree in the cause, a lien was declared in favor of Smith for this sum "on the purchase-money due the Blairs by the terms of said sale."

In this situation of affairs, Bradley & Co., on the 30th of July, 1873, made a conditional sale of the property thus bought to the defendants, Wylie, Knevals & Co., which contract was reduced to writing, and afterwards modified or changed by a new contract in writing about September 17, 1873. By the terms of the contract, so far as they can be gathered from the pleadings and proof, the contracts themselves not being produced, Wylie, Knevals & Co. had at first agreed to advance a certain sum of money to Bradley & Co. to meet pressing demands, and had the option of taking the property at the price of \$180,000. Afterwards, by the modification of the contract, the option of taking the property was still reserved to Wylie, Knevals & Co. at the price of \$180,000, by giving notice to Bradley & Co., "as set forth in said agreement of July 30, 1873." And the contract adds, "the provisions of said agreement in that behalf and in respect to the payment of interest are still continued in force, it being agreed that the whole of the purchase money, \$180,000, shall draw interest at seven per cent. from August 1, 1873. * * In case the parties of the first part shall take the said property, the amounts hereinbefore mentioned as paid to John A. McKinney and others, executors and trustees, and to John F. Smith, and Robert L. Blair Brothers, and the aforesaid advance to the parties of the second part, with interest at seven per cent.

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on said several sums, shall be credited upon and deducted from the gross amount of the purchase-money of said property."

It appears from the pleadings and proof that Wylie, Knevals & Co. had, under the original contract, executed their notes to C. W. Bradley & Co. on different days and for various amounts, in the sum of \$39,000. Three of these notes were dated July 31, 1873, and made payable at ninety days, for \$5,000 each. Another of the notes was dated August 5, 1873, at sixty days, for \$9,000. The dates of the other notes do not appear, but from the periods when they are shown to fall due, it may fairly be inferred that they were executed about the same time with those mentioned. Bradley & Co. endorsed these notes, and raised money upon them. The complainant, the Exchange and Deposit Bank of Knoxville, discounted the \$9,000 note, and two of the \$5,000 notes above described. The complainant, the Commercial Bank of Knoxville, discounted others of these notes to the nominal amount of \$15,000. And the Bank of Bristol, the complainant in an original attachment bill consolidated and heard with the bill of the other banks, and a defendant to the latter bill, and the cross-bill of the McKinney trustees, discounted the note of Bradley & Co. for \$5,400, and took as collateral security the third of the \$5,000 notes of Wylie, Knevals & Co., above described. The Referees find as a fact, to which finding there is no exception, that all of these notes of Wylie, Knevals & Co. were discounted, or taken as collateral by the banks

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in the months of July and August. No part of these notes has ever been paid, either by Bradley & Co., or Wylie, Knevals & Co.

The Referees find that out of the money thus raised by Bradley & Co., they paid, on September 15, 1873, to the McKinney trustees, \$16,877.55, the payments including the amounts due to the trustees for their share of the land, and the note which had been transferred to them by the Blairs. The sum thus paid also included the amount due upon a separate judgment of the trustees against Bradley & Co. The Referees further find, that on the same day the said trustees transferred and assigned, by the consent of Bradley & Co., "all their interest in and lien upon said (iron works) property," to Wylie, Knevals & Co. They further find that McKinney, at or before the assignment above, surrendered to Bradley & Co. their note for \$6,916.66, assigned to McKinney as aforesaid.

The Referees also find that Bradley & Co., out of the money raised by them from the banks, paid to John F. Smith, on September 16, 1873, \$6,355.25, being the balance in full due him from the Blairs, and which was declared a lien on their interest in the iron works property, or the proceeds of the sale thereof, and that Smith thereupon, by the consent of Bradley & Co., transferred and assigned his said lien to Wylie, Knevals & Co.

In making the payment to the McKinney trustees, the Referees find that Bradley & Co. drew a draft, dated August 15, 1873, at ninety days, on the Ex-

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change and Deposit Bank against the proceeds of the notes discounted by that Bank for \$5,000; that this draft was accepted by the bank, and received by John A. McKinney, the active trustee, as a payment; and that this draft was not paid, the bank having suspended. Afterwards, the bank paid upon the draft April 5, 1875, \$1,608.33.

On September 17, 1873, Bradley & Co. conveyed all their interest in the iron works property to a trustee in trust to secure a note of even date, due February 1, 1874, executed by them to Wylie, Knevals & Co. for \$21,773.45, with power of sale if the note was not paid at maturity.

The present litigation was commenced on November 7, 1873, by the Bank of Bristol filing a bill, based on the \$5,000 note of Wylie, Knevals & Co., which they had received as collateral, against Wylie, Knevals & Co. and Bradley & Co., praying an attachment to attach the interest of Wylie, Knevals & Co., as non-residents of the State, in the iron works property, "under a deed of trust executed by Bradley & Co. for their benefit, or otherwise," and for general relief. The attachment was levied the next day upon "all the right, title, claim or interest" that Wylie, Knevals & Co. "have in and to the property mentioned and described" in the deed of trust made by Bradley & Co. for the benefit of Wylie, Knevals & Co.

On February 3, 1874, the Commercial Bank of Knoxville and the Exchange and Deposit Bank of Knoxville filed a bill against Bradley & Co., Wylie, Knevals & Co., the Bank of Bristol, the Blairs,

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Smith, the trustee under the deed of trust of Bradley & Co., of September 17, 1873, and John A. McKinney as an individual. The bill was based upon the notes which had been discounted by these banks as above explained, and asked for an attachment of the iron works property. The prayer was for a decree adjusting and settling all questions of priority, subrogation, and equity of the several parties, for a sale of the property, etc. The attachment was levied on "all the right, title, claim and interest that C. W. Bradley & Co. have in the Embree Iron Works property," describing it. The bill was answered by the Blairs and the Bank of Bristol, and taken for confessed against the other defendants.

On November 26, 1873, John A. McKinney moved the court, upon affidavit, to set aside the *pro confesso* order taken against him, and that he be made a defendant in his character of executor and trustee of the will of John A. McKinney, deceased, and permitted to answer and file a cross-bill to assert the rights of the trustees under that will. The chancellor granted the application, and McKinney filed an answer and cross-bill, the main object of the cross-bill being to set aside the assignment of September 15, 1873, as being without consideration, and made for a purpose which failed. This bill was answered by the Blairs and the Bank of Bristol, and taken for confessed against Bradley & Co. and Wylie, Knevals & Co. The other trustees of the McKinney will were afterwards made parties complainant to this bill by amendment.

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The Referees find that Wylie, Knevals & Co. gave Bradley & Co. written notice on October 1, 1873, that they would take the iron works property "as per agreement, dated September 17, 1873." They further find that the notes of Wylie, Knevals & Co. were discounted and taken on the personal standing of the parties thereto, and that there was no contract or understanding that their interest in the iron works property was to be, in any manner, bound.

The chancellor, upon final hearing, set aside the assignments of Smith and McKinney to Wylie, Knevals & Co., and ordered the iron works property to be sold, the proceeds, after the payment of costs, to be applied, first, to pay the McKinney trustees the balance due them for their share of the property; secondly, to pay the banks to the extent of the balance of the amounts secured to McKinney and Smith; thirdly, to the Blairs to the amount of their debts secured by the decree of sale to Bradley & Co.; and lastly, the balance to Bradley & Co. The chancellor gave the banks severally a decree on their claims against Wylie, Knevals & Co. and Bradley & Co. From this decree the Blairs, and Evans, who stands in the same attitude, appealed.

The Referees were of opinion that the action of the chancellor in setting aside the *pro confesso* order against McKinney was erroneous, and that the transfers of Smith and McKinney to Wylie, Knevals & Co. were valid, but the rights thus acquired were subordinate to those of the Blairs. They were further of opinion that Wylie, Knevals & Co., by their notice

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to Bradley & Co., of October 1, 1873, exercised the option given them by the contracts of July 30 and September 17, 1873, and became purchasers of the iron works property, their previous advances being thereby made payments *pro tanto* on the purchase price. They are of opinion that the Bank of Bristol is entitled to a certain priority over the other banks, and that whatever recovery the Exchange and Deposit Bank may be entitled to should inure first to the benefit of the McKinney trustees to the extent of the unpaid part of their accepted draft. They order the property to be sold, and the proceeds distributed:

1. To pay the Blairs the amount due them out of the proceeds of their shares.
2. To pay the costs of the cause.
3. To pay out of any balance, after paying the Blairs and costs, and out of the proceeds of the McKinney] share, the amount due the Bank of Bristol.
4. To next satisfy amount due Exchange and Deposit and Commercial Banks.
5. Then Bradley & Co. are entitled to balance of purchase-money due them from Wylie, Knevals & Co.
6. Any surplus to go to Wylie, Knevals & Co.

The Referees, of course, recommend an affirmance of the chancellor's decree in favor of the banks, on the notes held by them, against Wylie, Knevals & Co. and Bradley & Co., and say that the Lyle interest in the property is not to be affected by the decree.

The Exchange and Deposit Bank, the Commercial Bank, and the McKinney trustees file exceptions to the report of the Referees.

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The exception which requires first to be noticed is that to the finding of the Referees, that the chancellor erred in setting aside the *pro confesso* order against J. A. McKinney, and allowing him, as the executor and trustee of the will of John A. McKinney, deceased, for himself and the other executors and trustees, afterwards added as co-complainants, to answer the bill of the Knoxville banks, and to file a cross-bill. The record shows that the Blairs alone excepted to the action of the chancellor in this matter, and the Referees were, therefore, in error in recommending generally a reversal of what had been done. At most, the action of the chancellor could only be impeached in so far as it affected the interest of the Blairs, leaving the proceedings in full force as to the other parties who have never objected. But, curiously enough, it was to the interest of the Blairs to sustain the chancellor, for the rights of the banks as against the Blairs depended upon the validity of the assignment by the trustees of their debts and liens to Wylie, Knevals & Co., and the object of the answer and cross-bill of the trustees was to show that their assignment was without consideration, because the debt had been paid, as far it was paid, by Bradley & Co., and that the purpose of the assignment had failed. Moreover, the Blairs, being defendants, could not object to an order of court, made with the assent of the complainant Banks, setting aside the *pro confesso* against a co-defendant, making new parties defendant, and allowing them to make defense. It appears, also, that the interest in the

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subject-matter of litigation was not in John A. McKinney as an individual, but in the executors and trustees in the will of John A. McKinney, deceased. These trustees were necessary parties to the suit, and were properly permitted, with the assent of the complainants, to be made parties, and to assert their right. This exception to the report of the Referees is therefore well taken.

Treating the trustees as before the court, it is clear that they have no interest in the matters of litigation, except as to so much of the consideration of their share of the iron works property as remains unpaid, if any. For they admit that the note of Bradley & Co., which they took from the Blairs, and which was a lien on the share of the Blairs, was paid by Bradley & Co., and this fact is admitted both by Bradley & Co., and Wylie, Knevals & Co., by allowing the cross-bill to be taken as confessed against them. The proof establishes, moreover, and so the Referees have found, that this note was paid by Bradley & Co., and was surrendered to them "at or before" the assignment of September 15, 1873. All that the trustees can claim in this controversy is the unpaid balance of the purchase price of their share of the land, for which, as the evidence clearly shows, they took the draft of Bradley & Co., of August 15, 1873, on the Exchange and Deposit Bank. But the chancellor and the Referees both came to the conclusion, in substance, that this balance is unpaid, is a lien on the trustees' share of the land, and that when collected, it should go to the trustees. The

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banks did not appeal from the chancellor's decree, nor do they except to this part of the report of the Referees. And the Blairs have no interest in the question, for they have only a lien for unpaid purchase-money on their shares of the land, the shares of the tenants-in-common or co-owners having been sold severally: *White v. Blakemore*, 8 Lea, 49. This is the conclusion of the Referees, as shown by their disposition of the proceeds of the sale of the iron works property.

In this view, the Lyle share not being in controversy, the only questions remaining are the relative rights of the Blairs on the one side, and of the banks on the other, and of the banks as between themselves.

The Blairs, under the decree confirming the sale of the iron works property, have a lien on their share of the property, ten and a half-twelfths, for so much of the purchase-money of that share as may remain due and unpaid by Bradley & Co. By the decree the note of Bradley & Co. for \$6,916.66, transferred to McKinney's trustees, was first to be paid. And by a decree in the case of Smith against the Blairs, John F. Smith was given a lien on the share of the Blairs for \$6,134.69, with interest from July 6, 1872. The contention of the banks is that these debts of the trustees and Smith were paid on the 15th and 16th of September, 1873, by Wylie, Knevals & Co., and were thereupon assigned to them, together with the liens reserved for their payment. The contention of the Bank of Bristol is, that it acquired a right to

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priority of satisfaction out of the interest of Wylie, Knevals & Co., acquired by these assignments, by virtue of their attachment of November 8, 1873. The contention of the other two banks is that Wylie, Knevals & Co. took these assignments to secure them for so much money advanced by them to Bradley & Co., and that the banks, by virtue of the fact that these debts were actually paid by the money advanced by the banks on the notes of Wylie, Knevals & Co., are entitled to be subrogated to the rights of Wylie, Knevals & Co., all of the banks to be "upon an equal footing." The contention of the Blairs is that the debts in question were paid by Bradley & Co. before the assignment, whereby they became extinguished. And further, that Wylie, Knevals & Co. exercised the option of becoming purchasers of the iron works property, under their contracts with Bradley & Co., whereby their advances, as expressly provided in the contracts, became mere payments on the property, to be "credited upon and deducted from the gross amount of the purchase-money." There would, in this view, be nothing for the banks to be subrogated to.

The Referees, having excluded from their consideration the answer and cross-bill of the McKinney trustees, and the proceedings thereunder, came to the conclusion that the debts of Smith and the trustees were paid at the time of the assignment. But this conclusion of fact is clearly erroneous when we look to the whole record, as we are compelled to do after sustaining the exception to that part of the Referees'

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report. The contract between Bradley & Co. and Wylie, Knevals & Co., of July 30, 1873, appears to have been an agreement by which the latter firm were to advance money to the former firm to meet pressing demands, in consideration of which the New York firm were to have the option until October 1, 1873, to buy the iron works property at the price of \$180,000. The money was advanced by the execution of notes to be used for the purpose of raising the required funds. These notes, the Referees find, were used during the months of July and August, and the proceeds were no doubt promptly disbursed in the payment of the most pressing debts. The testimony of McKinney and Bradley is to this effect, and McKinney proves that he was paid by the drafts or checks of Bradley & Co. on the Knoxville banks. He further testifies that, at the urgent solicitation of C. W. Bradley, and upon his representation that the banks could not advance all the money at once, he agreed that other debts might be first paid, and that he would receive the draft of Bradley & Co. on the Exchange and Deposit Bank, at ninety days, for \$5,000 on his debt. The proof shows that this draft is dated August 15, 1873, and although Bradley long afterwards, in waiving the necessity of demand and notice, states that it was drawn on September 15, there can be little doubt that it was drawn when dated, and that the money raised on the notes was paid out before September 15.

About September 15, 1873, the contract between Bradley & Co. and Wylie, Knevals & Co. was modified.

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The object of the modification was, as the circumstances show, to vest Wylie, Knevals & Co., with all the interest of Bradley & Co., in the iron works property acquired by the use of the money raised on the notes of Wylie, Knevals & Co. The mode adopted by Bradley & Co., who alone, by C. W. Bradley, were active in the matter, was to take the assignments of the McKinney trustees and Smith for their liens on the property, and to execute a trust conveyance of the property by themselves to secure the residue of the money raised on the notes. The notes, it will be remembered, were for \$39,000. The debt secured by the deed of trust of Bradley & Co., amounted to \$21,773.45. The debt of McKinney, as recited in the assignment, is \$16,877.53, and of Smith \$6,355.25. The aggregate of these sums exceeds the nominal amount of the notes by several thousand dollars, and one of the debts recited in the McKinney assignment was an individual debt of Bradley & Co., having no connection with the sale of the iron works property. It is obvious, therefore, that the plan resorted to was somewhat crude, and crudely carried out.

Be this as it may, we think it is clear that these debts had all been paid, so far as they were paid, by Bradley & Co., before the making of these assignments. This is proved by McKinney and Bradley as to the debts of the trustees. There is no direct proof in relation to the Smith debt, except that Bradley says he paid it before he made a payment of \$5,000 on the McKinney debt. But the date and amount

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of that debt are shown, and the assignment is of the whole of it, as if paid at the time. The actual debt, however, at that time, with interest, would have been a little over \$6,600, whereas, the debt, as recited, is only \$6,355.25. The inference would be that it had actually been paid before the assignment. If these debts were in fact paid by Bradley & Co., as the Refereess find, and before the assignments, they would have been extinguished, and could not be revived to the detriment of the Blairs. It is conceded that the payments to McKinney should be first applied to this debt.

The proof is conclusive that Wylie, Knevals & Co. did exercise, under their contracts with Bradley & Co., the option of taking the iron works property on October 1, 1873. The notice in writing was filed, and proof of the signatures waived by the parties. It is argued that as the notice purports to be dated in New York on the very last day for exercising the option, the court will judicially know that it could not be given in Tennessee on the same day. But, although apparently executed in New York, *non constat*, that it was not in fact executed in Tennessee, and even if written in New York on the day of its date it may have been delivered to one of the other contracting parties in that city on the same day. Moreover, the vendors might waive performance to the day, and close the trade under the contract. The testimony leaves no doubt that the notice was accepted by Bradley & Co. as sufficient.

It is further argued, on behalf of the banks, that

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as soon as the assignments were accepted, their right to subrogation at once accrued, and could not be affected by any thing done afterwards. But Wylie, Knevals & Co. took the assignments, as they did the deed of trust of Bradley & Co., under the contract of September 17, 1873, with the express stipulation that if they exercised their election, and became the purchasers of the property, the amounts paid to Smith, the McKinney trustees and the Blairs, as well as the advances to Bradley & Co., should become payments on the purchase price, and credited accordingly. After election, Wylie, Knevals & Co. could not enforce these debts, nor any liens taken for their security, and a creditor of theirs cannot, in the absence of contract, stand in any better situation.

All of the exceptions to the Referees' report are met by the foregoing remarks and conclusions except one. The Blairs took judgments in the case in the chancery court on the notes of Bradley & Co., given for their interest in the iron works property, and sued out execution thereon. It is insisted that this was a waiver of their vendor's lien. But it is a vendor's equity or lien, which exists by law after the vendor has parted with the title, that may be waived. An express lien retained by deed, or by a decree under which land is sold, is equivalent to a mortgage, and is not affected by the recovery of judgment on the purchase notes, and issuance of execution thereon: *Stephens v. Greene County Iron Company*, 11 Heis., 71; *Hines v. Perkins*, 2 Heis., 395; *Byrns v. Woodward*, 10 Lea, 444; *Mulherrin v. Hill*, 5 Heis., 58.

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The result is that the Blairs are entitled to subject their ten and a half shares of the iron works property to the satisfaction of the unpaid purchase-money due to them from Bradley & Co., free from the debts and liens of John F. Smith and the McKinney trustees for any part of that purchase only. The McKinney trustees will be entitled to subject their one share of the property to the satisfaction of the balance of purchase-money due to them from Bradley & Co. Any surplus of this share will be applied to the reimbursement of so much of the purchase-money of the share as may have been paid by the Exchange and Deposit Bank, with interest. The banks take nothing by way of subrogation to the rights of Wylie, Knevals & Co. The Bank of Bristol has obtained by its attachment the interest of Wylie, Knevals & Co. in the iron works property, subject to the payment of the residue of the \$180,000 purchase-money, with interest. The Knoxville banks take nothing by their attachment, Bradley & Co. holding the legal title in trust for the vendees, and being only entitled to the unpaid purchase-money with a lien therefor as an incident. The attachment was levied on the land, not the purchase-money: *Stephenson v. Yandle*, 3 Hayw., 109; *Irvine v. Muse*, 10 Heis., 477; *Ament v. Brennan*, 1 Tenn. Ch., 431.

The chancellor's decree will be reversed, and a decree entered in accordance with this opinion, which modifies the report of the Referees. The costs of the entire cause will be paid first out of the proceeds of the sales of the shares of the Blairs and

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the trustees, these shares bearing the burden of the costs proportionately. The banks are entitled to judgments on their respective demands against Wylie, Knevals & Co. and Bradley & Co., and recovering these judgments at the same time, they are entitled to have ratably applied to their satisfaction any surplus proceeds of the sales of the shares above mentioned, after paying costs and the purchase-money debts, as hereinbefore directed.

G. W. TELFORD v. J. D. COX.

LEVY OF EXECUTION. *Personalty. Released by injunction.* The levy of an execution on personalty is released by an injunction from the chancery court, either at the instance of the debtor, or of a third person.

FROM WASHINGTON.

Appeal in error from the Circuit Court of Washington county. NEWTON HACKER, J.

H. H. INGERSOLL for Telford.

I. E. REEVES and S. J. KIRKPATRICK for Cox.

COOPER, J., delivered the opinion of the court.

Cox recovered a judgment before a magistrate against G. W. Telford and D. K. Self, which was stayed by E. H. West. Execution issued thereon, upon which

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the sheriff made return that he had levied on certain personal property described, without stating whose property, and that a sale was prevented by the service of an injunction on him, forbidding the sale, issued from the chancery court at Jonesboro, in the case of *D. K. Self v. Telford Manufacturing Company et al.* An *alias* execution issued, which was returned by order of the plaintiff. A *pluries* execution was levied by the sheriff on land as the property of Telford. The papers were thereupon returned to the circuit court for the condemnation of the land, and a judgment of condemnation was rendered. Afterwards, at the same term, Telford moved the court to set aside the judgment, and refuse to condemn the land, because the return on the original execution showed a satisfaction by the levy on sufficient personalty, and therefore the *pluries fi. fa.* was improperly issued. The court overruled the motion, and Telford appealed.

Treating the levy as being on the property of Telford, which the appellant's argument assumes, it does not follow that it was a satisfaction of the execution. For neither its value nor the extent of Telford's interest therein appears (*Fuller v. Watkins*, 11 Heis., 489), and it does appear that the sale was enjoined by a bill in chancery. If the bill be filed by the debtor himself, it seems to be conceded by our cases that the injunction would operate like a *supersedeas*, and release the levy: *Overton v. Perkins*, M. & Y., 367; *Reece v. Parczyk*, 9 Lea, 328, 333; *McCamy v. Lawson*, 3 Head, 256. The reason is that it would ruin both debtor and creditor if the

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sheriff should be required to hold the goods to the termination of an injunction bill in chancery. The same reason, it is obvious, would equally apply if the injunction be sued out at the instance of a third person. And our cases so hold in effect: *Murphy v. Partee*, 7 Baxt., 373, which virtually overrules *Hume v. Hough*, 5 Heis., 708. And see *Tucker v. Pruett*, 4 Yer., 553. The levy is annulled by the mandate of the law: *Fry v. Manlove*, 1 Baxt., 256. Of course, if the levy was on the property of Self, the injunction would operate a release, and the appellant could not claim a satisfaction of the judgment.

Affirm the judgment.

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COAL CREEK MINING AND MANUFACTURING COMPANY
v. THOMAS L. MOSES.

1. TRESPASS. *Damages. Mining.* It is the duty of a person working a coal mine on his own land, near to the boundary line, to make surveys to prevent encroachment on the adjoining land, and to keep accurate accounts of the coal mined near the line, and, if he fail to do so, the evidence as to the quantity of coal taken will be construed most strongly against him, and the least evidence of bad faith on his part would make every intendment in favor of the injured party.
2. SAME. *Same Same.* But if such person is shown to have acted fairly, and the trespass is proved to have been unintentional and inadvertent, the measure of damages is the value of the coal *in situ* before the trespass, and the incidental injury, if any, to the land by the taking or mode of taking.

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3. *SAME. Same. Same.* The weight of recent authority, even in actions at law, where the trespass is inadvertent, by one miner on the lands of another, is to limit the recovery to just compensation, and this rule is certainly not changed by bringing the suit in chancery.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

ANDREWS & THORNBURGH and A. S. PROSSER for complainant.

HENDERSON & JOUROLMON for defendant.

COOPER, J., delivered the opinion of the court.

Bill filed March 28, 1883, to charge the defendant with the value of coal mined by him on the land of the complainant. The master and chancellor agreed upon the amount of coal mined, the exceptions of the parties to the master's report being all disallowed, and the chancellor charged the defendant with the value of the coal thus mined at the mouth of the mine, deducting only the expense of removing it there from the place where it was dug. Both parties appealed.

The defendant owned a small tract of land adjacent to a much larger tract of complainant's, the dividing line between the two tracts being well known and defined. The defendant made an opening on his land, about one hundred and forty-five feet from the dividing line, for the purpose of mining coal, running the main shaft in a direction inclining to-

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wards the line, with branches right and left nearly at right angles therewith. It is conceded that some of these shafts to the right were driven over on the land of the complainant. And the contest is partly over the quantity of coal thus mined, and partly over the measure of damages sustained.

The bill charges that the defendant, in connection and partnership with others in working their mine, "unlawfully and without the consent" of complainant, had run the said mine over the boundary of complainant's land, and taken therefrom a large amount of complainant's coal, and sold and converted the same. That the complainant cannot state the amount of the coal thus sold and converted, for the reason that the defendant and his partners, with the purpose of preventing the complainant from ascertaining the amount, pulled down and took away the pillars and props which held up the roof of the mine, thereby causing the roof to fall in throughout a large extent of the entries and chambers, and rendering it impossible for the engineers and agents of the complainant to explore the mine, measure the excavations made, and ascertain with accuracy the amount of coal taken out. The bill then adds: "Your orator charges that all the coal taken from your orator's land as aforesaid was still the property of your orator after it was mined and removed, and when it was converted, appropriated and sold by the defendant and his partners, and that all the money received by them, or either of them, for said coal was in law received by them to the use of your orator. And your orator electing to

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sue for the value of said coal so converted, and not for the wrongful removal thereof, charges that said Moses, as one of said partners who appropriated, converted and sold the same, is indebted to your orator in the amount of the full value thereof after it had been brought to the surface and sold by them, or after it had been placed on the railroad cars for shipment to market." The prayer of the bill is that an account be taken of the amount of coal so converted, and for a decree therefor.

The defendant, in his answer, admits that in working the mine the foreman, superintendent and workmen did "inadvertently and unintentionally" run across the boundary into complainant's land, and remove therefrom a small amount of coal without the consent of complainant or warrant of law, and that the coal was taken and sold by the defendant. He says that the trespass was committed inadvertently, the defendant having frequently, and in ample time, directed the foreman not to go upon complainant's land, but to leave a safe margin, which instructions were intended to be complied with, and the mistake being occasioned by the unevenness of the surface of the ground, and the nearly level grade of the excavation. As soon as defendant's attention was called to the fact, he at once stopped work in that part of the mine, and complainant never had any further cause of complaint. The answer further states that measurements were made and estimates taken by agents of the complainant sent for the purpose, so as to ascertain the amount of coal thus mined, with the result of which

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defendant was satisfied. From these measurements and estimates the defendant finds, he says, that the coal thus mined would not exceed 3248 bushels, which, at a royalty of one cent per bushel, the rate at which the complainant was leasing its lands for mining purposes, would be \$32.48. And, in order to prevent litigation, he made a formal tender of \$90 to the complainant, being about three times the actual sum due, "in full satisfaction of the coal mined," which sum he is ready to bring into court, if complainant will accept the same. Upon the refusal of complainant to accept the tender, defendant at once offered, if the company preferred a new measurement, to allow them to send any competent person to the mine, and to afford him every facility for making the measurement and ascertaining the quantity of coal taken, and to pay for the amount ascertained at the usual price. Shortly afterwards complainant and defendant's partner agreed that an engineer might be sent by complainant to estimate the coal, to be paid for at one cent a bushel, but the engineer was never sent. The defendant denies that either he or his partner, with the design of preventing complainant from ascertaining the amount of coal mined, pulled down the pillars, props or supports of the roofs, and says that the falling in of the mine was the usual and necessary effect of time.

The proof shows that defendant commenced working his mine in August, 1880, the foreman being instructed not to cross the boundary line, but to leave a margin. The foreman says he did step the dis-

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tance on the surface of the earth, intending to follow his instructions, but he was deceived in the direction of the first branch, and the miners themselves began to talk about the mine having crossed the boundary. Under these circumstances, on April 13, 1881, the complainant sent an engineer, who did actually measure the surface of the ground, and the first, second and third branches of the mine. As the result of this survey, the field notes of which are appended to his deposition in this cause, he found, and so reported to the defendant that the first branch was over the line about twenty-seven feet, but that the other branches were not, and he told defendant's foreman how far he might safely go, which the latter marked on the walls of the cuts. Work was at once stopped in branch No. 1, and never resumed. The other branches were continued to be worked within the limits designated by the engineer. In June, 1881, the same engineer returned, and measured branches 5, 6 and 7, No. 4 having, it seems, fallen in, and told defendant, who was with him, that none of them were over the line. After the commencement of this litigation, the same engineer makes a new survey of the surface of the ground, and finds that he was in error in his first survey by about eleven and one-half feet, to that extent increasing the trespass on complainant's land, and the amount of coal mined. And the master has increased the estimate of coal taken, upon the basis of this last survey, to 8,890 bushels. The evidence is clear that neither the defendant nor his foreman intended to, or did actually permit the working

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of the branches beyond the points designated by the complainant's engineer, and the weight of proof is that the work was not carried any further. A few of the miners are introduced by the complainant as witnesses, who undertake to guess at the length of the several branches, only one of them having adopted any mode of measurement, and he only as to one branch. The testimony of these witnesses is corrected by the time books of the defendant, showing the actual amounts of coal mined and paid for. The master has considered the testimony, and, properly enough, under the circumstances, has given it due weight in favor of the complainant. We concur with the chancellor in thinking that the master's estimate is substantially correct. The proof entirely disproves the charge of the bill that props were intentionally removed to prevent accurate measurements. The roof of the mine seems to have been of a rotten clay, through which water seeped, and fell in, in some instances, before the work was completed, and in other cases very soon after the work of mining ceased. But if the complainant had acted upon the defendant's proposition for new measurements about the time of the tender of \$90, which seems to have been within a month or two after the visit of complainant's engineer in June, 1881, there would have been little difficulty in obtaining accurate estimates.

Upon the foregoing facts we may say that it was the duty of the defendant in the first instance to have made the necessary surveys to prevent any encroachment upon the land of the complainant. He

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was in fault in not so doing, and he was also in fault in not keeping accurate accounts of the coal mined in each of the branches in the vicinity of the boundary line. For these omissions of duty on his part the master was clearly right in construing the evidence liberally against him. And if there had been the least evidence of bad faith on the part of the defendant, every intendment would be in favor of his adversary. But we think the evidence conclusively demonstrates his good faith. He not only threw no obstacle in the way of the complainant's engineer, but he showed his willingness to abide by his action. Nay more, after making a liberal tender upon the basis of the measurements of that engineer, conceding for the present that the measure of damages would be the usual royalty for mining, he was willing for a new measurement, and promised to settle by it. And there can be no doubt that he would have joined in making new measurements, leaving the question of the measure of damages open. Under these circumstances, the original fault of the defendant may be treated, in view of the assurances of the complainant's engineer and the subsequent conduct of the complainant, with leniency. The trespass on the complainant's land was clearly not wilful and intentional, but inadvertent.

The authorities are hopelessly in conflict as to the proper measure of damages where coal or ore has been mined by one person upon the land of another. Much of this conflict has grown out of the forms of action at common law, and the difficulty of confining

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the recovery to mere compensation, where the principle, upon which the form of action was supposed to rest, allowed a larger recovery. The tendency of the recent decisions is to ignore the form of action, and to regulate the recovery by the rule of compensation, looking to the intention of the defendant. The course of English decision is curiously illustrative of the change of judicial opinion. Originally, even in the case of an inadvertent trespass, the plaintiff was held entitled to the value of the coal after it was mined, without any deduction for the cost of severing: *Martin v. Porter*, 5 M. & W., 551; *Morgan v. Powell*, 3 Ad. & El., 281; *Wild v. Holt*, 9 M. & W., 472. Afterwards, the rule was modified so that in a case where the trespass was fully proved, but without fraud, it was held that the defendant was liable only for the value of the coal, deducting the cost of its severance and carrying it to the mouth of the mine: *In re United Merthyr Collieries Company*, L. R., 15 Eq., 46. Again, even at law, in an action of trover, if the jury found that the defendant acted fairly and honestly under a claim of right, they were instructed to give the fair value of the coal as if the coal field had been purchased from the defendant: *Wood v. Morewood*, 3 Ad. & El., (N. S.), 440. And finally, in a case in the House of Lords, it was held that where the defendant innocently and ignorantly worked the coal beyond his boundary, the measure of damage was the value of the coal *in situ*, in addition to any surface damage there may be; *Livingston v. Rawyard's Coal Company*, 42 L. T., (N. S.), 334. And this rule

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has been adopted by the court of chancery: *Hilton v. Wood*, L. R., 4 Eq., 432; *Jegon v. Vivian*, L. R., 6 Ch., 760. The tendency of the American decision is to adopt the same rule, whether the action be trespass, as in *Foot v. Merrill*, 54 N. H., 490, or trover, as in *Forsyth v. Wells*, 41 Penn. St., 291. "Where," says the court in this last case, "there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land as his mining may have caused. Such would be manifestly the measure in trespass for mesne profits." And so we have held in *Ross v. Scott*, in an opinion delivered with this. And such was the decision of this court in the case of a wrongful trespasser who, cut timber on land in *Ensley v. Nashville*, 2 Baxt., 144.

The complainant in his bill says that he elects "to sue for the value of said coal so converted, and not for the wrongful removal thereof." He then argues that his bill is in the nature of an action of trover for the conversion of the coal after it had been mined, and gives him a right to its full value without deduction, or, at any rate, only a deduction for

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bringing the coal, after it is severed, to the mouth of the mine. And this is the rule of the early cases in England, and of the courts of Maryland and Illinois. But the fact that any deduction is allowed shows that the action of trover does not allow the plaintiff to recover the full value of the property converted. And the learned counsel of the complainant in this case admits that, according to the authorities, the recovery is increased or diminished by the greater or less wrongful intent in the conduct of the defendant. If, he says, the coal was taken under an honest but mistaken belief of ownership, the measure of damages is the value of the coal at the mouth of the mine, deducting the expense of digging and transporting it to the mouth of the mine. But if the action is thus flexible, it may well be made still more so in order to secure the end of all action, just compensation. "It is quite apparent therefore," says the Supreme Court of Pennsylvania in *Forsyth v. Wells*, *ut supra*, "that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. Where there is no fraud or violence or malice, the just value of the property is enough." And this is the result of the late English decisions in the action of trover. The action is, therefore, what our statute provides that all actions for wrongs to property shall be, in which money only is demanded as damages, and that is an action on the

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facts of the case: New Code, sec. 3441. And by waiving the tort, and coming into equity, the complainant has certainly not rendered his action less flexible. The facts of this case do not show any special ground for damages to the complainant's land, and all that he can reasonably ask is just compensation, which would be the value of the coal taken *in situ*, or the usual royalty for mining, one cent per bushel.

The tender made by the defendant to the complainant was not technically valid, because it was accompanied with the demand of a receipt in full, and because not brought into court. But we think it is sufficient, in connection with the other circumstances of the case, to require us to exercise the discretion of the chancery court in the matter of costs, and to charge the complainant with the costs of the court below. The defendant, having prosecuted his appeal with effect, is of course entitled to the costs of this court as against the complainant.

McCracken v. Nelson.

AMANDA J. McCracken v. GEO. W. NELSON *et al.*

1. **REVIVOR.** *Scire facias.* Where a party to a suit dies and *scire facias* is ordered as against the administrator and heirs of the deceased, naming them, except one heir, and the writ issued and was served upon the administrator and all the heirs, naming them, the revivor is valid.
2. **SAME.** *Same. Misnomer.* If the *scire facias* is served upon an heir, and in the return of the officer the true name is not given, proceedings based thereon are not void. The heir being served by one name, should have pleaded in abatement for misnomer, and the error would have been corrected.

FROM WASHINGTON.

Appeal from the Chancery Court at Jonesborough.
H. C. SMITH, Ch.

BROWN & DEADERICK for complainant.

I. E. REEVES and H. H. INGERSOLL for complainants.

DEADERICK, C. J., delivered the opinion of the court.

In May, 1880, the complainant filed this bill in the chancery court at Jonesboro, alleging that she is the youngest of the six children and heirs-at-law of John McCracken, deceased, who died in January, 1865; that said McCracken owned, at his death, a tract of land of sixty or seventy acres, out of which dower was assigned to his widow; that the complainant was a small child at the death of her father, and continued to live on said land with her mother up to the time

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of filing her bill, and was then twenty-three years of age.

The bill further alleges that defendant, Nelson, about 1860, obtained a judgment against her father for \$—, before Mathes, a justice of the peace, and that the cause was taken in some way to the circuit court of Washington county, and during its pendency there, said McCracken died. Sometime thereafter, as charged, the cause was revived by a void order against the administrator of McCracken and five of the heirs, but not against complainant. She alleges that no *scire facias*, or other notice, was ever served upon her. But the suit was revived and judgment rendered, and said land was sold, and bought by defendant, Nelson, and that he took possession, and had held all said land but the dower tract thenceforward.

She seeks to set aside the sale of her sixth interest in the land, and have an account for rents and profits.

An imperfect transcript of the condemnation proceedings and sale of said land, under the orders of the circuit court, is made an exhibit to the bill. The clerk certifies the transcript to contain the orders of court, judgment and copy from execution docket, copy of bill of costs, sheriff's returns, and Nelson's raised bid, and that this is all of said record which he can find after diligent search.

Nelson answers, and sets up in defense that the judgment was taken, execution issued and levied on the land, and returned for condemnation to the circuit court. There the cause was pending until January

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1865, when defendant died, and soon thereafter *scire facias* issued against the administrator and the heirs-at-law of deceased, and was served upon all of them, and the judgment revived and land condemned and sold, and he became the purchaser, and has ever since held the same.

The chancellor held no *scire facias* was awarded against complainant, and the sale was void as to her, and gave her a decree for one-sixth of the land and an account for rents and profits. This account was taken, and a decree rendered thereon for \$192.30, the value of the rent of said one-sixth, and the land was sold for partition, and from the final decree, defendants, the heirs-at-law of Nelson, he having died, appealed to this court.

The Referees recommend an affirmance of said decree, and defendants except.

The transcript of the circuit court proceedings shows that at June term, 1867, the death of defendant, McCracken, had been previously suggested and proved; it was then suggested that Alexander Mathes was his administrator, and that John, William, George, Catherine and Elizabeth McCracken were his heirs-at-law. On motion, suit was revived against said administrator and heirs-at-law, and it was ordered that *scire facias* issue, notifying them to appear at the next term and show cause why the suit should not be revived against them. It will be observed that in this order directing the issuance of a *scire facias*, the name of the complainant, as one of said heirs-at-law, does not appear.

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At the next term there was an order for an "*alias* counterpart *scire facias*," to issue to Sullivan county. At the next term, February, 1868, an order appears reciting that it appeared to the court that the *scire facias* had been served upon the administrator, and George McCracken, James McCracken, William McCracken, Catharine McCracken, Elizabeth McCracken, John McCracken, and Jennie McCracken, and they having failed to show cause to the contrary, the suit was revived against them, and on motion of plaintiff, judgment by default was rendered against them for the amount of plaintiff's recovery against decedent, and interest thereon and costs. In rendering this judgment the order recites, that it appearing to the court that an execution from the justice of the peace was levied upon the land, describing it, on the first day of June, 1863, by S. T. Shipley, sheriff of the county, it was ordered that said land be sold, etc. Then follows the bill of costs, and issuance of *venditioni exponas* to S. T. Shipley, sheriff.

The return of sale is full, made by Griffith, successor of Shipley, showing a sale to the plaintiff, G. W. Nelson, June 20, 1868, for \$100, and from the execution docket Nelson appears, on June 24, to have raised his bid to the sum of \$724.04, the amount of his judgment and interest and costs.

The order of February term, 1868, does recite that the *scire facias* had been served upon Jennie McCracken, which, it is insisted, is the name by which complainant is known. And the deputy sheriff testifies that he did serve his process on three girls,

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daughters of McCracken, and two sons, at their home in Washington county; the daughters were served at the house, and the sons in the field. The other son was served in Sullivan county. Three sons and three daughters, it appears from the record, were all the heirs-at-law of deceased.

George W. Nelson also deposes that he was present when the deputy sheriff served the writ upon the five children then at home, three girls and two sons, and saw him execute the process on the complainant.

So that it seems pretty clear that the writ was in fact executed upon complainant by the name of Jennie McCracken; and it is also adjudged, at a term after the writ was returned, that the sheriff had served the writ upon all the heirs of decedent, though as to complainant, by a different name from that in which she filed her bill. Yet we are satisfied that she was in fact notified by the service of the writ. And although the names are not mentioned in the writ, if issued against them as heirs, and the sheriff, in his return, gives them, this has been held sufficient: 3 Hayw., 299; 2 Yer., 394.

The complainant, in her bill, admits that Nelson had obtained a judgment against her father before Mathes, a justice of the peace, which was removed into the circuit court, and it appears in the record that is filed as an evidence, that upon the judgment an execution was issued and levied upon land, and the papers returned into the circuit court for condemnation of the land. The record is imperfect, but enough appears to show that the court had jurisdic-

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tion of the subject-matter and parties, and that the judgment, even if erroneous, was not void, and cannot be impeached collaterally.

The chancellor and Referees held that the complainant was not served with the *sci. fa.*, and therefore the judgment was void. We think it is very clear she was served by the name of Jennie McCracken.

The complainant having been in fact served with the writ, as an heir-at-law, by one name, might have pleaded in abatement for misnomer, and in such case the true name being disclosed, the error could have been corrected, and the error is certainly not of a character to render the judgment void.

We are of opinion, therefore, that the decree of the chancellor was erroneous, and the same will be reversed, and the Referees' report set aside, and complainant's bill will be dismissed.

Hoard and Kite v. The State.

ALFRED HOARD, AMBROSE HOARD and ROBERT KITE
v. THE STATE.

1. EVIDENCE. Where witnesses, to establish an *alibi*, prove that defendants stayed at the house of K. on the night of the murder, and that K. was at home that night, and in the jurisdiction of the court at the trial, it is competent for the defendant to show that the mental condition of K. was such that he could not be introduced as a witness.
2. SAME. *Same*. The State having introduced witnesses to sustain the general character of certain State witnesses, the defendant may introduce counter-vailing witnesses as to the general character of said State witnesses.
3. SAME. *Judge may state evidence. Practice.* While it may not be reversible error for the court, upon controversy between counsel in argument, to state that a witness did not make a certain statement, yet in view of the possibility of the judge, during a long and tedious trial, failing to hear or remember all the testimony, it is the better practice to have the witness recalled.
4. SAME. *Juror. New trial.* Where a motion for a new trial based upon the affidavit of two reputable witnesses, that a juror had formed and had expressed an opinion as to the guilt of the defendants before his selection as a juror, it is made to appear to the court that the juror, upon a former trial, heard the evidence of a most important witness, and admitted that he had a conversation with affiants at the time and place stated by them, and "thinks it probable he did say that if the proof was sufficient to hang them, they ought to be hung, or if the proof showed them guilty, a juror ought to have gizzard enough to convict, or something to that effect," the court should grant a new trial, although the juror may state further that he had not formed or expressed any opinion when selected as a juror.

FROM GREENE.

Appeal in error from the Circuit Court of Greene county. NEWTON HACKER, J.

A. S. DEADERICK, W. S. DICKSON, S. G. SHIELDS

Hoard and Kite v. The State.

and G. W. PICKLE for Alfred and Ambrose Hoard and Robert Kite.

ATTORNEY-GENERAL LEA, J. H. ROBINSON and H. H. INGERSOLL for the State.

COOKE, J., delivered the opinion of the court.

Mrs. R. C. Hunter, on the night of the 14th of February, 1884, at about the hour of nine o'clock, while sitting at home with her husband and family, was shot through a window and killed by some person upon the outside. The prisoners were indicted for the offense, and jointly tried and convicted of murder in the first degree, and sentence of death pronounced upon them. A motion for a new trial having been overruled, they have appealed to this court.

Various errors have been assigned and relied upon for a reversal. It appeared in evidence that the assassins were not seen, but upon examination, the tracks of two persons were discovered near the window, through which the deceased was shot, and were followed a distance of some two hundred and fifty yards, perhaps, to a creek, where they disappeared, and the theory of the State was, that a boat had been held at that place by defendant, Kite, until the Hoards, who it was claimed, made the tracks and did the killing, after which they crossed the creek or escaped in the boat. Upon the trial, a witness named John Harris, among other things, testified that he heard defendant, Kite, say at Payne's depot, that it was talked about through the country that he held the

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boat while the Hoard boys did the shooting, but that he said this was not true. Counsel for the State then asked the witness if he had not heard others say that defendant, Kite, held the boat while the others did the shooting? The defendants objected to the question, but the court overruled the objection and the witness answered, that "he had heard lots of people talk about Bob Kite having held the boat."

This is assigned as error. It is frankly conceded, by counsel for the State, that the question was illegal, and the overruling the objection to it by the court was erroneous; but it is said that, although erroneous, it was only proving or repeating what the witness had testified, that the defendant, Kite, himself had said, and consequently could not affect the defendants injuriously, or at most, could only tend to the injury of defendant, Kite. It is also insisted, that the answer of the witness, that he had heard lots of people *talk about* Bob Kite having held the boat, as it is not stated what they said about it, could not injure the prisoner, for the reason that no conclusion could be legitimately drawn as to what these people did say. We think, however, that whether critical accuracy of construction would justify this assumption or not, a jury would, most likely, refer the answer to the question and give it as broad and comprehensive a signification as the question itself would indicate, which was that he had heard people say that Bob Kite held the boat while the Hoard boys did the shooting. The State had the right, if it saw proper, to prove the statements of defendant, Kite, as against himself,

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which it did, and that statement carried with it his denial of the truth of this neighborhood talk, but by the question and answer under consideration, the State, in effect, got these hearsay statements before the jury, as to all of the defendants, stripped of defendant Kite's denial of their truth.

The testimony was clearly illegal, and in a case involving the lives of the prisoners, we cannot undertake to say they were not affected injuriously by it, and hold it was error to admit it.

The next error relied upon is as to the defendant, Alfred Hoard. He introduced as witnesses, Lucy Kite and Annie Kite, the wife and daughter of one Peter Kite, to prove an *alibi* for him, and if they were to be believed, did prove very clearly by them that he was at the house of Peter Kite at the time the deceased was killed. They both further testified that said Peter Kite was also at home on the night of the killing, and that he was then in Greeneville, the town where the trial was being had. The defendant then offered to prove, by way of explanation of the reason why Peter Kite was not also introduced as a witness by him, that said Kite had been shot or received an injury in the head during the war, as the record states, for the purpose of showing his mental condition. This was objected to by the State, and the objection sustained by the court. It is insisted for the State, that if it was the purpose of the defendant to prove that said Peter Kite's mental faculties were so impaired, by an injury of the head, as to deprive him of mind and memory sufficient to enable

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him to recollect and detail facts as they occurred, it was too indefinitely stated to put the court in error on account of his refusal to admit it; and also, that the testimony was immaterial, and for that reason was properly excluded.

It is true, that the object of the testimony is not very artificially or clearly stated, but enough is stated to show that it was the object to prove that Peter Kite's mind, owing to an injury he had received upon the head, was not in its normal condition. It had been proved by these two witnesses, whose testimony was assailed, that he was at home on the night of the murder, and that he was there accessible to the defendant, and of course might be called as a witness if there was nothing to prevent his being examined, and his non-introduction by the defendant unexplained, might justly be the subject of injurious comment. In this view, the defendant had a right to show, if he could, that said Peter Kite's mental condition was such that he could not be introduced as a witness. We think the testimony was competent and should have been admitted. How much weight the jury would have given to it is not for us to determine.

During the progress of the trial, the State had introduced two witnesses, James Roark and Ellen Byas, each of whom had delivered damaging testimony against the prisoners, and had been subjected to a rigid cross-examination.

The State, in support of their testimony, introduced and examined several witnesses as to the general character of said witnesses, Roark and Byas, who testified

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that they were acquainted with their general character, and from that they were entitled to credit upon their oaths. Upon cross-examination of these sustaining witnesses, it was developed that Ellen Byas was a lewd woman, and that James Roark had been charged with larceny. When the State closed, the defendants offered to introduce countervailing witnesses as to the general character of said Roark and Byas, to which the attorney-general objected, and the objection was sustained by the court, and defendants were not permitted to introduce and examine said witnesses.

No reason is stated for the State's objection to the introduction of these witnesses, or in the action of the court upon the objection, why they were excluded, and none appears to us. This action of the court was clearly erroneous.

In the argument of the cause a difference arose between the counsel for the State and the defendants, as to the testimony of the prosecutor, James Hunter. Testimony had been offered tending to show that the tracks of the persons that were discovered after the murder leaving the house, were wide apart and larger than the tracks approaching the house, and appeared to have been made by persons running. A witness had testified that one of the defendants, in speaking of the appearance of the tracks that were said to have the appearance of the tracks of persons running, had said: "Oh, pshaw! that was us boys." Counsel for the defense, as explanatory of this remark, was insisting that Hunter, the prosecutor, had testified that on the next morning after the killing, when the defendants

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were present, and they were measuring the tracks and comparing the feet and tracks of the defendants, Hoard, with those that were discovered, and that they had run and jumped to make tracks that morning, and that was what the defendant referred to when he used the expression above stated. The counsel for the State denied that the prosecutor had made any such statement in his testimony, and this was the contention between the counsel. The court, upon his own motion, told the jury that the prosecutor had made no such statement, to which the defendants excepted, and this is assigned as error. It is insisted that the constitutional provision that the court may state the testimony and declare the law, applies only to his charge, and it is error for him to attempt to do so at any other time.

We held, in a recent case at Nashville, that the court, under said provision had a right, upon a controversy between counsel pending the argument of the cause as to what the testimony of a witness was, to state it to the jury. The only difference between that case and this is, that the court there stated to the jury what the witness had said in his testimony. Here he told them that the witness had not made any such statement as that contended for by the defendant's counsel, but did not undertake to state what the testimony was.

In view of the possibility of the judge, during a long and tedious trial, failing to hear or remember all of the testimony of each witness examined, we think it would have been more satisfactory to have

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recalled the witness and had him state whether or not he had delivered the testimony as contended for by the defendant's counsel, but we are not prepared to say it was reversible error in the court to make said statement to the jury, especially as the record fails to show that the defendants offered to recall the witness and examine him as to what his statement had been.

In support of their motion for a new trial, the defendants introduced their own affidavit, together with the affidavits of J. M. Morelock and Isaac M. Swaney. In their affidavit the defendants state, among other things, that they had learned since the rendition of the verdict against them, that Joseph Good, one of the jurors who tried the case and rendered said verdict, had formed and expressed an opinion previous to his selection as a juror; that there had been a previous mistrial of the case, and that as they are informed and believe, said juror had expressed his regret that he had not been a juror on said former trial, and stated that the defendants ought to be hung, or that he would have hung them; that said juror had stated upon his examination, that he had not formed or expressed any opinion as to their guilt or innocence, and they were ignorant that he had done so when they elected him as a juror, and until after the verdict was rendered.

The affidavits of said Morelock and Swaney each stated that at Ernest's Mill, in Greene county, Tennessee, after the first trial of the cause, they had a conversation with said juror, Good, who stated that

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he was summoned as a juror on the former trial, or had been sent for, but that he did not go, but he wished he had gone, or been on said jury; that he wanted the defendants hung; that he would have hung them if he had been on the jury, or words to that effect. They say they are in no manner related to the defendants, and are entire strangers to them. They were brought into court and cross-examined in open court, where they made substantially the same statements. The State introduced the affidavit of the juror, Good, who denied the statements imputed to him by said Morelock and Swaney; says they were mistaken; admits that he was at Ernest's Mill and had a conversation with said witnesses; says he had never formed or expressed any opinion as to the guilt or innocence of the defendants; says he had never heard the evidence in the cause; "thinks it *probable* he did say that if the proof was sufficient to hang them as the murderers of Mrs. Hunter, they ought to be hung, or if the proof showed them guilty, a juror ought to have gizzard enough to convict them, or something to that effect," but does not undertake to state any more definitely what he did say to these witnesses. Upon being brought into court and cross-examined, he states "that he was summoned as a juror on the former trial one evening, but did not attend until the next morning, when he went to court, but the jury was made up and he was not called; admits that he did remain in the court-house, he thinks, about one hour, and heard and listened to the testimony of the prosecutor, Hunter, until his examination in chief was

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about concluded; admits that he heard the prosecutor testify as to how his wife was killed when she was killed; something about the Hoard boys being there the next day, measuring their feet and making tracks," but says he did not form any opinion.

The testimony in chief of the prosecutor, as it appears in this record, is very material, and is well calculated to make an impression highly prejudicial, to say the least of it, to two of the defendants.

It is proper to state that both of the witnesses as to the expression of opinion as to the guilt of the defendants, by the juror, Good, are shown by testimony to be men of good character and standing, as is also the juror himself.

We think the decided weight of the testimony is, that this juror had formed and expressed a decided opinion as to the guilt of the defendants, and was incompetent.

This is a much stronger case than *Johnson v. The State*, 11 Lea, 47, which went a step further in sustaining the verdict where a juror had expressed an opinion, than any previous reported case. In that case it did not appear that the opinion expressed by the juror was founded upon what purported to be evidence that had been or would be introduced on the trial, or that he had conversed with any witness, or any one who had heard a witness. Here the juror, by his own admission upon cross-examination, had heard the testimony in chief of one of the principal witnesses for the State, and by the testimony of two credible witnesses, wholly uncontradicted, ex-

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cept by himself, had expressed a decided opinion that the defendants ought to be hung. He was not in a condition to give the defendants that fair and impartial trial which the law guarantees to them.

Some exceptions have been taken to the charge of the court, but without entering into a critical examination of them, it is sufficient to say we think the charge, as a whole, is substantially correct.

For the errors above specified the cause must be reversed and a new trial awarded the defendants. As the case is to be again tried, we have purposely refrained from any expression or intimation of opinion as to the facts presented by the record.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAIL-
ROAD COMPANY v. J. T. MASSENGILL.

NEGLIGENCE. A conductor agreeing to put a passenger off at a station is bound to stop the train at that place, so that the passenger can get off in safety, even though his ticket is only to the last station passed before reaching it, additional fare being receivable if demanded, but the mere agreement and duty to stop, and the ringing of the bell by the conductor is not sufficient ground and inducement by the conductor to induce the passenger to believe that the train had stopped. When the train fails to stop at the station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, he does so at his own risk.

FROM SULLIVAN.

Appeal in error from the Circuit Court of Sullivan county. NEWTON HACKER, J.

Railroad Company v. Massengill.

W. M. BAXTER and W. D. HAYNES for Railroad Company.

C. J. ST. JOHN and THOMAS CURTAIN for Massengill.

FREEMAN, J., delivered the opinion of the court.

The plaintiff sues the defendant because, as alleged in his declaration, the company having agreed, in consideration of fare paid, "to carry plaintiff on its road to his home at Union depot," and there stop its train and allow plaintiff to descend from same in safety, which said agreement was not kept," but by its carelessness, negligence and failure to perform its duties the plaintiff was, at or near Union depot, violently thrown to the ground, and greatly injured, etc.

Defendant pleads not guilty, and a special plea "that the injuries received were caused by the careless and negligent conduct of the plaintiff in attempting to get off defendant's train while said train was in motion."

On these issues the case went to a jury, who, under the instructions of the court, gave a verdict of \$7,000 in favor of plaintiff, from the judgment on which an appeal in error is prosecuted to this court. The Referees have reported in favor of an affirmance of the judgment, to which defendant files seven exceptions, opening all the questions in the case.

A short statement of facts will present such questions as we deem necessary to consider in the disposition of the case.

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Plaintiff had obtained a ticket at Dalton, Georgia, purchasing a ticket to Johnson City, his home at Union depot being beyond that. At Johnson City, plaintiff, who was unknown to the conductor, Charles Toms, said to him his ticket was out there, and asked him if he could stop and put him off at Union depot. The conductor told him he was behind time, and could not do so, but sold him a ticket to Bristol, beyond his home, telling him he could go on to that point and take the western bound train, coming back to Union, and get home sooner than from Johnson City, to which plaintiff agreed. However, at a station five miles from Union depot, the conductor came to plaintiff, and told him he had made up his lost time, and would stop for him to get off at Union depot, at the same time paying back the difference between the fare to Bristol and Union. So plaintiff rode on under this contract that he was to get off at Union, his home. It is proper to add, the night train on which plaintiff was traveling did not, as per its schedule, stop at Union depot.

The train reached Union depot about four o'clock, February, 1883. On approaching Union depot, the conductor rang the bell, as plaintiff says, several hundred yards from the depot. "When the train got near, as I thought, I went to the rear of the car; I discerned what I thought to be the depot; when I came to the platform I thought the train *was in the act* of stopping, not perfectly still; when the train came up I discerned the depot; the stopping place is right near the depot, sometimes beyond it; I

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thought when I stepped off the train had stopped about five steps east of the depot. The place I aimed to get off is the usual place of getting off; when the train reached this place I thought it was perfectly still, and stepped off." In doing so, the train being in fact in motion, he was thrown to the ground and severely injured. We have given the above quotation from the testimony of plaintiff himself, who may be assumed to have given the case no unfavorable coloring against himself at least. He adds, in conclusion of his testimony, "at the time I stepped off the train I thought it had stopped; I was not calculating it was still running," and that the conductor did not assist him off.

On cross examination, he says he "could see the depot, as he was coming out and walking on the steps" to get out, "and the train was in motion; I knew it was in motion as it passed the depot, but thought it had stopped as I stepped off on the ground." He "stepped off about five steps only after the train passed the depot."

Several objections are urged against the charge of his Honor, the circuit judge, among others that it is so vague, general and abstract as to have misled the jury, and this is assigned as reversible error.

The charge is subject to the criticism of being too elaborate, too much in the way of general discussion of several questions, not the vital ones, by any means, in the case. But we have repeatedly said, we cannot undertake to revise the mere form or errors of taste, as we might think, in the inferior

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courts. We must see an affirmative error of law by which a jury might reasonably have been misled.

On the main question, however, on which the case turned, and which by the declaration was the gravamen of the suit, that is, of culpable negligence on the part of defendant in not stopping its train, as agreed, at Union depot, so that plaintiff could safely descend the steps and get off, it is insisted there is palpable error.

His Honor, after charging that if the conductor had agreed to put plaintiff off at Union, had taken his fare to this place, he was bound to do so, and that he was bound to do so at the usual place, etc., says: "And if the conductor led the plaintiff to believe he would stop at the usual place for taking and letting off passengers, and if plaintiff, laboring under such belief, prepared himself to get off at such point, and if, being so induced by the said conductor, he honestly and in good faith believed that said train had stopped at the accustomed place for taking and letting off passengers, when in fact it had not, and if plaintiff, while the train was in motion, but in *good faith believed* it had stopped, stepped off, and was thrown forward by the motion of the train and injured, then the railroad would be liable." He adds this qualification to the above: "But if the evidence should show that the said train, on reaching the depot or accustomed place of stopping, was simply checking up in order to stop, but had not stopped, then if plaintiff, knowing this, jumped off such train while the same was moving, of his own accord, and was thrown forward and injured, then

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plaintiff could not recover." He then adds: "If plaintiff, at the time he was injured, was not in the exercise of ordinary care, he cannot recover."

The court was correct as to the introductory proposition, that if the conductor, receiving the fare to Union depot, had agreed to stop at that point, he was bound to do so. "A conductor, agreeing to put a passenger off at a place not a regular station, is bound to stop the train at that place, so that the passenger can get off in safety, even though his ticket is only to the last station passed before reaching it, additional fare being receivable, if demanded: Wait's Act. & Def., vol. 5, page 312; *Western Railroad Company v. Young*, 57 Ga., 489.

But the theory of the main proposition cited above is clearly erroneous as applied to the facts of this case, and the issues on which his Honor was called on to instruct the jury, when he said to the jury, after stating the conductor was bound to stop, as agreed, "and if the conductor led the plaintiff to believe that he would stop at the usual place for letting off passengers, and if plaintiff, laboring under such impression, prepared to get off," etc., could only have been understood by the jury as laying down the rule that the mere agreement and duty to stop and ringing bell was sufficient ground and inducement by the conductor to authorize plaintiff to honestly believe that the train had stopped, and so the company was liable for thus having misled him to his injury. The facts clearly show that there was no other ground on which the conductor could have been assumed to have

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misled plaintiff, except having agreed to stop, and having rung the bell in good faith, no doubt, to carry out that agreement on nearing the depot.

The opposite of this would be the law. The mere fact that the company had agreed to stop the car at the depot would furnish no basis on which a passenger could assume necessarily, or as a matter of fact, that the train had stopped, when in fact it was in motion, and had been seen to be in motion only a few seconds before as it passed the depot, only about five steps from where the plaintiff claims was the stopping place, nor render the company liable, because the passenger *bona fide* believed it had stopped. In order to have made the company liable on this theory the agent of the company must have, by specific acts or conduct, directed to the fact that the train had stopped, misled the plaintiff, whereby he was injured by being thus misled by the company's agent, as for instance as he stood on the platform ready to descend the steps, or on the steps ready to step on the ground, the conductor had directed him to get off, that the train had stopped, and he relying on this, with reasonable caution, attempted to get off and was injured, the injury would be the result of the conduct of the company's agent, and it is liable for damages. But this is not the idea that is fairly to be gathered from his Honor's charge. "The general rule," says Judge Thompson in his work on Carriers of Passengers, page 267, "that a party is not entitled to leap off the train when the company fails to give sufficient time for getting off, and a party doing so

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merely to avoid the inconvenience of being carried by the point of his destination, cannot recover for injuries resulting from such act." There are found certain just exceptions to this rule as given by the author, but nothing that would sustain the judgment in this case.

In fact, the whole theory of this part of the charge is, that as the train should have been stopped for plaintiff to get off near the depot, and plaintiff in good faith believed it had, when it had not, the company would be liable. This would be to hold the company liable for the plaintiff's mistake, and not for any wrong done by it. It could only be held, as we have said, for the wrong of the agent in influencing, by specific act or word, the precise step by which the plaintiff was injured in a case like the one presented in this record. This is not relieved by the qualifying part of the charge requiring knowledge on the part of plaintiff when he jumped off, that the train was in motion, and jumping off of his own accord.

As he was not directed to get off when he did, and did it of his own accord at that time, while the train was in motion, it was his duty to have exercised diligence to secure his own safety, and if without being misled to the step at the time by a specific direction or act of the defendant's agent, he stepped off when the train was in motion, he took the risk of the act, and must bear the consequences. The general subsequent statement that the plaintiff must show he was in the exercise of ordinary care,

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or else he could not recover, does not relieve the charge from the objections we have stated. This conveys no very definite instruction to guide the jury, but at most in connection with the main charge, that in following his *bona fide* belief, and in getting off while the train was in motion, the plaintiff must have done so with proper care. Whether he got off carelessly or carefully could make no difference, if he was not directed or induced at that time to get off by act or word of defendant's agent, misleading him to the step, he would still be doing so on his own motion and at his own risk.

Without discussing other questions presented in argument, for the error indicated the judgment will be reversed and the case remanded for a new trial.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAIL-
ROAD COMPANY v. W. L. MCKNIGHT.

MASTER AND SERVANT. *Extra services.* Where the servant voluntarily performs extra services, and the servant gives the master no notice of any intention to claim compensation for same, but settles with him stately under his original contract, the law will imply no contract and give no compensation for said extra services.

FROM M'MINN.

Appeal in error from the Circuit Court of McMinn county. D. C. TREWHITT, J.

Railroad Company v. McKnight.

W. M. BAXTER, P. B. MAYFIELD and A. BLIZZARD for Railroad Company.

J. N. AIKEN and BURKETT & LANE for McKnight.

WASHBURN, Sp. J., delivered the opinion of the court.

The defendant in error was depot agent, express agent and postmaster at Charleston, Tennessee, from April, 1869, to August, 1881, the post-office being kept in the depot by permission of plaintiff in error free of rent. The distance from the point at which the trains usually stopped to the post-office is from fifty to seventy-five yards. During all these years defendant in error met the trains on their arrival, and carried the mails to and from the cars. On July 7, 1881, he was discharged from his agency by the plaintiff in error, and on the 29th of the same month brought this suit in the circuit court, claiming \$2,500 as the reasonable value of his services in carrying the mails to and from the post-office during the time mentioned.

The declaration contains but one count, and is as follows: "The plaintiff sues the defendant for \$2,500, which, he says, is due him from the defendant for work and labor done by the plaintiff for the defendant in carrying the United States mail to and from the United States mail train, at the depot in Charleston, Tennessee, to the post-office in said town, from the first day of April, 1869, to the first day of August, 1881, at the instance and request of the defendant, which sum of money, with the interest thereon, is due and unpaid."

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The railroad company filed four pleas, upon which issue was taken, viz: 1. *Non assumpsit*. 2. *Nil debit*. 3. Statute of limitations of six years. 4. A special plea that during all the time for which compensation is claimed, defendant in error was the general agent of the defendant at said depot, and that the service sued for was but part of the duties of his agency, and was fully paid for before suit brought. On the trial the jury found a verdict for the defendant in error, and plaintiff in error has appealed. The Referees have recommended a reversal of the judgment, and defendant in error filed exceptions thereto.

It nowhere appears in the proof that plaintiff in error was a contractor with the United States for carrying the mails, nor that it was any part of its duty to deliver the mails at the post-office at that point; and this, though assumed in the charge of his Honor, the circuit judge, is a mere matter of inference and not of proof. It does appear that in his capacity as express agent, for which he was paid a monthly salary, it was the duty of defendant in error to meet each mail train, and it further appears that upon his earnest solicitation he was allowed the use of a room in the depot building for a post-office free of rent. During all these twelve years and more defendant in error received and receipted for his salary as agent of the company, and never asked for additional compensation, nor notified the railroad company that he expected such compensation.

The circuit judge charged the jury that if the post-office was less than eighty rods from the road,

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then it was the duty of the company to deliver the mail, and if plaintiff, in the absence of an express contract to do so, performed said service with the knowledge and assent of the company, and the company accepted and received the benefit of said service, then the law would imply a contract on the part of the company to pay a reasonable compensation therefor, etc. But if said services were performed as a part of plaintiff's duties as depot agent, or were gratuitously performed at the time, plaintiff could not recover in the absence of an express contract or provision to pay on the part of defendant.

This charge is erroneous in two particulars:

First. It assumes and directs the jury as a matter of law that the plaintiff in error was a contractor with the post-office department of the United States government, and that as such it was its duty to deliver the mail at all post-offices within eighty rods of the line of road.

Second. We hold the law to be that when the relation of master and servant is established by contract, and during the existence of said relation the servant voluntarily performs services for the master with no agreement or understanding that he should be paid for said extra services, and the servant gives the master no notice of any intention to claim compensation for such services, but settles with him stat-
edly under his original contract, the law will imply no contract for said extra services: Wood on Master and Servant, secs. 86, 87 and 90; *Hair v. Bell*, 6 Vt. R., 35; *Angle v. Hanna*, 22 Ill., 429.

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Other errors are assigned, but we forbear to notice them, as for the reason above stated.

The judgment must be reversed and the cause remanded.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY v. R. C. WHITE.

IGNORANCE OF LAW. *Postal regulations.* As to postmasters and agents of the Post-office Department, the general postal regulations are not facts but law, and agents and employes of said department will not be allowed to predicate actions upon ignorance of same.

FROM JEFFERSON.

Appeal in error from the Circuit Court of Jefferson county. J. G. ROSE, J.

W. M. BAXTER and HENDERSON & JOUROLMON for Railroad Company.

INGERSOLL & PARK and PICKLE & TURNER for White.

WASHBURN, Sp. J., delivered the opinion of the court.

The defendant in error was a postmaster at White Pine, a station on the East Tennessee, Virginia & Georgia Railroad, the post-office being within eighty rods of the depot at that point.

From May 1, 1876, to May 16, 1879, at which

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last date he ceased to be postmaster, the defendant in error received the mail at the train, and carried it to his office, a distance of from ten to twenty rods. This service was voluntary on his part, performed under no contract, and with no expectation of compensation therefor. During the time mentioned, plaintiff in error was a contractor with the government of the United States for carrying the mail on the various lines of its road, and as a part of its contract, "it was required to take the mails from and deliver them into the terminal post-offices, and to all intermediate post-offices located not over eighty rods from the line of road, and the distance from the terminal depots to the post-offices where railroad companies deliver the mails are paid for by the Department as part of the length of the route": U. S. Post. Reg., sec. 639.

This suit was brought before a magistrate by defendant in error, claiming compensation from plaintiff in error for the service so rendered. Judgment was rendered in his favor, and on appeal to the circuit court the jury rendered a verdict against plaintiff in error, from which it has appealed in error to this court. The Referees have recommended an affirmance of the judgment and the case is before us on exceptions to their report.

The jury have found the facts in favor of defendant in error, and the evidence was sufficient to warrant their finding. Many errors are assigned to the charge of the court, but in the view we take of the case, it is unnecessary to notice but one.

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The court charged the jury, among other things, that "the plaintiff could not rely upon ignorance of law affecting his duty, but only ignorance of fact, and in this connection the jury will consider the regulations of the Post-office Department read in evidence, as matters of fact."

It is insisted that this charge conforms to the rulings of this court, in cases holding that the maxim, "*Ignorantia legis meminem excusat*," applies only to public and general laws and not to *private* enactments: 1 Sneed, 698; 1 Head, 79. And undoubtedly such is the law. But without discussing the character of these postal regulations, or deciding whether they do or do not fall within the class of laws recognized as public and general, they are the official rules and charter prescribed for the guidance of all agents and employees of the Post-office Department, from the highest to the lowest, and such agents and employees are of necessity, charged with knowledge of these fundamental rules.

Among other regulations is section 639, Postal Laws, cited above. And section 3850, Revised Statutes, is as follows: "No postmaster, assistant postmaster or clerk, employed in any post-office, shall be a contractor or concerned in any contract for carrying the mail."

To allow contractors, postmasters and agents of the Post-office Department to escape responsibility by pleading ignorance of the rules prescribed for their guidance, would be to open wide the door to fraud and dishonesty. We hold, therefore, that in view of the relation sustained by the parties to this suit to the Post-office Department, the charge of the circuit judge

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was erroneous, that as applicable to this case the postal regulations were not facts, but law, and that the judge should so have instructed the jury.

Reversed and remanded.

J. G. CRAWFORD v. THE STATE.

CRIMINAL LAW. *Putting obstructions on railroad track.* Where defendant placed obstructions on railroad track for the purpose of getting a job or reward for notifying the railroad of the obstruction, and signaled the train and had it stop before it struck the obstruction. *Held*, he was guilty under the statute (new Code, sec. 5387), of wilfully and maliciously placing obstruction on the railroad track.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

S. G. HEISKELL and C. F. HUMES for Crawford.

ATTORNEY-GENERAL LEA for the State.

TURNER, J., delivered the opinion of the court.

Plaintiff in error was indicted in the criminal court for Knox county, and convicted of placing obstructions on the East Tennessee, Virginia & Georgia Railroad, and sentenced for two years to the penitentiary. He confessed to having placed the cross-ties, rocks, etc., upon the road, but said that he "put the ties and

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rock on the road to get a job; that he heard the train blow the signal for Concord, and ran down the railroad to stop it. He said if the engineer had not seen him when he was waving down train, all would have gone down together."

When signaled, a few minutes after one o'clock at night, the train "was running at the rate of thirty-five or forty-five miles per hour." The signal was given by plaintiff in error standing in the middle of the track, waiving his coat and hat. Do the facts make a violation of section 4638, old Code, 5387 new Code, as follows: "Whoever wilfully and maliciously puts upon the track of any railroad in this State, any kind of obstruction, * * * so as to endanger the safe running of the locomotive and cars, or either or any of them, is guilty of a felony?" etc.

While the judge of the criminal court has defined the terms wilfully and maliciously satisfactorily, it is insisted that, as the prisoner placed the obstructions upon the road with a view to advance his own interest in the procurement of a job or other reward for notifying the company's agent of the obstruction, and not intending a wreck, the jury was not warranted in finding the verdict.

We do not think the purpose of the accused, as afterwards declared by him, can avail him. Was the running of the locomotive and cars endangered? It was at least as late as one o'clock at night. The prisoner had to run down the road a sufficient distance to flag the train in time to secure a stop before reaching the obstruction. He was not prepared with

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any of the usual danger signals. He took the chance of the engineer failing to see him (who alone could see him, as the fireman was firing the engine). He undertook for the watchfulness of the engineer at a late hour of the night, and at a point where, perhaps, danger might be least expected. He not only risked the ruining of the train he signaled, but also of such as might be traveling a contrary direction, and voluntarily admits in his confession that if his signal had not been seen, or had been unheeded, all would have gone down together. If in his run to meet the train he had fallen, or if he had been off time, or any accident had occurred to prevent him from success in the attempt, a wreck was inevitable. All these risks were existing, yet he undertook to overcome them, and in the undertaking endangered the running of the train and the lives of the agents and passengers. His was an experiment that he could not possibly know would succeed. The want of such knowledge made the danger aimed against by the statute.

Affirm the judgment.

Boyce v. Stanton.

J. P. BOYCE, Executor, etc., v. J. C. STANTON *et al.*,
and other consolidated causes.

1. **VENDOR AND SUB-PURCHASERS.** *Release of lien.* A. sold to B. a tract of land, which B. cut into lots, and sold the most of them to various sub-purchasers, before he had himself obtained title. After decree of sale to enforce his lien, directing that the portion still held by B. should be first sold, A. released B.'s portion, sufficient in value to pay off his lien, having notice of the sale of the rest to sub-purchasers. *Held*, that A. thereby waived and released his lien on the lots of sub-purchasers.
2. **SAME.** *Same. Date of estimated value.* The value of the part released, after such decree, estimated in this case as of the date of the release. The fact that B. had quadrupled the relative value of his portion after the purchase, or doubled it after the decree and before the release, does not affect the rule; the full value of the property first liable must be credited as against sub-purchasers.
3. **SAME.** *Same. Vendor and mortgagee.* The vendor with a lien occupies toward sub-purchasers from the vendee, and subsequent encumbrances, the same relation as would a first mortgagee to second mortgagee.
4. **SAME.** *Purchase pendente lite.* One who purchases portions of such land during the pendency of the vendor's suit to enforce lien, is entitled to the same protection as one who bought before suit brought, provided the vendor has notice of purchase.
5. **SAME.** *Same. Injunction.* But if the purchase was made pending an injunction on the original vendee, the same is voidable at the instance of the party suing out the injunction, and against him the sub-purchaser has no such equity.
6. **SAME.** *Notice of sub-purchase.* Registration of deed to sub-purchaser is not notice to vendor of the sub-purchaser's equity; but assertion of the same by pleading, or report thereof by the master, or recital thereof in decrees in a cause to which the vendor is a party, will be constructive notice to him.
7. **SAME.** *Notes of sub-purchasers.* The holders of the purchase-money notes of such sub-purchasers by assignment from the original vendee are entitled to an equity equal to that of the sub-purchasers, and of the same general character.

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8. **TRUST.** *Implied or constructive.* The promise of B., under such circumstances, that if the execution of the order of sale is delayed, and he allowed to sell his portion privately, the proceeds shall be applied to the payment of the vendor's lien and other incumbrances on the whole tract, and the consequent assent of all parties to the delay, and the sale by B. during such delay, constitute a trust-fund out of the proceeds of sale, for the satisfaction of the various encumbrances and the protection of sub-purchasers.
9. **SAME.** *Assignee of trust-fund.* Any person, and especially the vendor, who receives such fund with knowledge of the facts, giving it a trust character, is chargeable with it as trustee, or with so much of it as comes to his hands.
10. **SAME.** *Same. Claim of assignee in bankruptcy.* The character of the fund is not changed by the subsequent bankruptcy of B.; and his assignee has no claim upon or right in such trust fund.
11. **CONSENT DECREE.** *Character and effect of.* A consent decree is in the nature of a judicial contract between the parties consenting, and after its entry, is as conclusive upon parties as other contracts, and cannot be avoided by the subsequent protest or retraction of dissatisfied parties.
12. **SAME.** *Binding on whom.* Such decree is binding only on such parties to the cause as consent thereto, either in the terms of agreement or those of consequent adjudication, made in pursuance of the agreement, unless it clearly appear that the decree was rendered upon a hearing of the cause.
13. **MISTAKE.** Mistake as to the legal effect and consequences of an act is not ground for relief in equity.
14. **SAME.** *Registration. Parol proof.* A deed takes effect from the date it is noted for registration, and the date of such noting may be proven by parol, even to the correction of a mistake.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

J. B. HEISKELL and TOMLINSON FORT for Boyce.

J. B. & T. H. COOKE, and M. H. CLIFT for general attaching creditors.

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J. A. CALDWELL, NASH H. BURT, and PHELAN
& GOREE for mechanics and furnishers.

DEWITT & SHEPHERD, WHEELER & MARSHALL,
and BARTON & SON for sub-purchasers.

W. L. EAKIN for Duffy.

INGERSOLL, Sp. J., delivered the opinion of the court.

The separate cases, almost a hundred in number, in these consolidated causes present, in numerous transcripts, containing many thousands of pages, a manifold and complicated controversy between a vendor and other creditors of an insolvent vendee, and sub-purchasers under him, and the holders of their purchase-money notes, over the titles to and proceeds of the sale of numerous lots in the city of Chattanooga, worth now fully a half million dollars, and all embraced in the boundaries of an original purchase by Stanton from Boyce in the year 1870. Various portions of this so-called Stanton litigation have been before this court, and been adjudicated, during the past twelve years; and in 1880 all the consolidated causes were here on appeal for decision.

The general determination of the court, then, is thus stated:

“While we are satisfied the decree of the chancellor is not based upon correct principles, and is not sustained by the record, yet we see enough to satisfy us the merits of the case cannot be attained upon the record as it is at present, and that further inquiry

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must be made; and to that end additional pleadings and proof thereunder are necessary": 5 Lea, 432.

The chancellor's decree, which had declared Boyce's vendor's lien satisfied, and also held him to account to attaching creditors for funds of Stanton declared to be in his hands, was therefore, on Boyce's appeal, reversed, and the causes remanded, to the end that by proper pleadings, amended and supplemental, all the equities of the various parties in interest might be regularly presented for adjudication, and all necessary parties brought before the court, to the end that complete justice might be done in the premises.

Accordingly, after the remand, various bills, original, amended and supplemental, were filed by numerous parties, creditors, sub-purchasers and holders of their notes. Numerous petitions were also filed by sub-purchasers, and orders were made thereon. Many mechanics and furnishers, with decreed liens, are also permitted to become parties complainant to the creditors' bill filed by Crutchfield and others, and to set out in the order, on the minutes of court, as amendment to said bill, their several decrees for recoveries and liens; and the master was ordered to issue, and send out a copy of the same, with the *subpœna* to answer, as though the same had been embraced in an amended bill regularly filed. Many of these proceedings, and especially the last named, are here earnestly objected to because of their informality and irregularity; and the objections, if properly made *in limine*, would probably have been fatal. But where, as is the case in most instances, the defect is formal merely, and the parties

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treated the matters as though they were before the chancellor for adjudication, we have ignored the irregularities and treated the matters here just as the parties themselves treated them in the court below.

The facts of the case are set forth at length in the opinion of Judge Turney, reported in 5 Lea, 423, under the style of *Alabama v. Stanton*, and it is not therefore deemed necessary to repeat them in detail here. A brief outline must suffice:

In January, 1870, Dr. J. P. Boyce, as executor of Ker Boyce, deceased, sold and gave bond for title to J. C. Stanton for about sixty-nine and a half acres of land, then in the immediate suburbs of Chattanooga at the price of \$2,000 per acre, mostly in deferred payments. Stanton immediately proceeded to lay it off into city lots, with streets and alleys, as a part of the city, setting apart about twenty-four acres for the use of the Alabama & Chattanooga Railroad Company, then in process of construction, on which he erected engine-house, depot, shops, etc. He also retained some five or six acres more, on which he erected the Stanton hotel, a livery stable, a post-office, and perhaps other buildings. The most of the remainder he sold in lots to various purchasers, to some giving deeds, to others title bonds; from some receiving cash and others notes, which he negotiated to divers parties. Many purchasers built houses upon their lots, and otherwise improved them.

In 1871, creditors of Stanton began filing bills to attach his interest in the entire purchase. These were soon followed by the bills of mechanics and furnish-

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ers, asserting their statutory liens specifically upon the hotel property, livery stable, post-office, etc., wherever they had done work or furnished materials. Then came the bill of Boyce, as vendor, to assert his lien upon the whole premises sold to Stanton. In 1873 and 1874, after consolidation, decrees were pronounced declaring the rights, equities and priorities of the various parties, and directing sales for the satisfaction of the prior lien of the vendor, and the subsequent liens of the mechanics and general creditors, but suspending the execution of the order till the decision of a controversy between Boyce, Whitesides and Crutchfield over the purchase-money of the property. Then ensued a long delay, even after the decision of that case, during which Stanton was endeavoring to raise the money to pay off all the debts. To accomplish this, he sold the twenty-four acre railroad lot, once to the receivers of the Alabama & Chattanooga Railroad Company in 1873. But this sale was never completed, nor does it appear ever to have been entirely abandoned or rescinded. Afterward, in 1877, Stanton bought the railroad, and then negotiated both the railroad and lot to one John Swann. To secure the necessary delay he had promised the creditors that the proceeds of this lot should be applied to the payment of debts that were liens on his property. He received most of the purchase-money, and made payments on the vendor's lien, bought up some of the debts at half-price, and assigned a considerable balance to Boyce, not however as credit on the purchase-money debt, but for Boyce's own

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personal benefit. Tax-sales and encumbrances also appear to increase the confusion and complications of this case, in which Stanton is the chief actor, and the proceeds of the sale of the twenty-four acre lot is the bone of contention. The common ground occupied by all the pleadings filed since the remand in behalf of sub-purchasers, assignees and creditors of Stanton, is that Boyce's purchase-money has been fully paid and his vendor's lien discharged, and this is the point in the case first in importance and in difficulty.

The sale was at \$2,000 per acre, and it is insisted that, though the tract sold was supposed to contain sixty-nine and a half acres, it was agreed that the exact quantity should be ascertained by survey; and that a survey by Stanton several years after the purchase showed it to contain only about sixty-seven acres, and that the purchase-money should be therefore abated *pro tanto*. It appears, however, that a survey made about the time of the sale showed sixty-nine and a half acres, and for aught that appears it was as accurate as the later one. Besides the decree of May, 1874, based upon the purchase-money notes of Stanton, fixes the balance due at \$122,501.90, and adjudges a recovery for that sum, and a sale of the property to enforce the vendor's lien. Stanton submitted to this adjudication; and in all subsequent proceedings it seems to have been acquiesced in and recognized by all parties as correct. We, therefore, regard it as conclusive of the amount of purchase-money then due. A report of the master, ordered at October term, 1877, and filed November 12, for

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- the purpose of showing what payments had been made on the vendor's lien, shows a balance due September 26, 1877, of \$56,694.87. This is after deducting from the sum aforesaid of the decree of May, 1874, the payments of \$18,372, in full of Crutchfield's interest, and \$72,000 to Boyce made in September. This report on purchase-money was unexcepted to, and may be properly assumed as correct, though no express decree of confirmation appears in the record.

To determine whether this balance has been paid, or the lien of vendor discharged in any way, requires a review of the negotiations and transactions of Stanton with the receivers of the Alabama Railroad, with John Swan, the representative of English capitalists purchasing the road, and with Fred. Wolffe, his agent and broker, and with Boyce, and an examination of their effect upon the suits then pending, also the relation and duty of Boyce to Stanton's creditors and sub-purchasers, whether intentionally assumed or imposed by law. For the latter it is insisted, not only that Boyce's lien has been extinguished, but also that he is liable as trustee of Stanton's property, or as his surety, in a sufficient sum to satisfy the debts of all his creditors. Boyce denies that his dealings had any relation to the purchase-money due him, denies that the same has been paid, or that he has any thing in his hands for, or is in any way liable to, Stanton's creditors on account of said dealings.

On May 19, 1873, at the hearing of these consolidated causes, the chancellor pronounced a decree determining the rights and priorities of most of the

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parties, and on May 23, 1874, in another decree affecting the same parties, with some others, the same adjudications are substantially repeated; and so far as they affect the questions now before the court, these decrees were submitted to by all parties in interest, and generally, if not universally, recognized by the parties as fixing their relative rights, equities and priorities, and frequently thereafter referred to and revived by subsequent orders till 1879. No reason appears why these decrees should not conclude the parties thereto, and we shall therefore treat them as a basis for the examination of subsequent transactions. These decrees declared the validity of Boyce's title and sale, the liability of Stanton, and the amount thereof, adjudging a recovery as aforesaid, and ordered a sale to enforce the lien of Boyce as vendor, and also the satisfaction of the claims of the attaching and lien creditors. The entire tract was held to be subject to the vendor's lien; but the decree contains the following specific directions and declarations as to the sale and the funds to be realized. There was to be sold:

"First. All that portion not heretofore sold or contracted to sub-purchasers by respondent Stanton.

"Second. If that part or unsold portion should not be enough to pay said vendor's lien, then the lot or portion last sold by respondent Stanton shall be next sold, and such sale then continued in the reverse order of sale so made by respondent Stanton until the vendor's lien shall have been satisfied.

"Third. In relation to the prior equities or con-

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flicting equities which may arise between sub-purchasers of lots or parcels of said sixty-nine and a half acres from respondent Stanton and mechanics and material men, the chancellor decrees that their equities will be determined according to priority of time; and if any such parties' rights or equities have to be sold or encroached upon in order to satisfy the vendor's lien hereinbefore declared, those will be last sold or taken that were first acquired, that is, the last acquired will be first subjected to the satisfaction of the vendor's lien, and in the reverse order of the time of acquiring their said equities until such residue of said vendor's lien shall have been satisfied.

"Fourth. As to general creditors of respondent Stanton, who have filed bills in these causes, attaching surplus, and had decrees rendered in their favor, but without specific liens, they will be paid out of any surplus that may remain from sales of said realty, after paying or satisfying the vendor's lien and specific liens in this decree declared, or that may exist under the principles of this decree; and such general creditors will be then paid out of such surplus in the order of time in which they filed their bills and attached such surplus.

"Fifth. The chancellor is of opinion, and so decrees, in all cases of sales of lots or portions of said realty by respondent Stanton, after the filing of such attachment bills, such sales of such lots or portions or parcels of ground will be held subject to such attachments, and such attaching creditors have their election to have such lots or portions of ground sold

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for the payment of their debts, or the notes or proceeds of sale for which respondent Stanton sold the same."

This decree established between Boyce and the other creditors and the sub-purchasers the relation of senior and junior lien-holders; and the duty of Boyce toward the others would seem to be the same as that of a first mortgagee with notice toward a subsequent mortgagee, purchaser, or lienor. He would, thereafter, have no right to release any portion of the land to the injury of the latter. If he should do so without their consent, they might insist upon a credit on the vendor's lien of a sum equal to the value of the property released, or an abatement of such proportion of his debt as the part released bore to the whole in value: *Jones v. Maney*, 7 Lea, 341; *Jones on Mortgages*, sec. 722; *Henshaw v. Wells*, 9 Hum., 566.

Whether this valuation should be made as of the date of the first mortgage, or of the subsequent purchase or encumbrance, or of the release, has not been uniformly determined, the decisions varying according to the peculiar facts of the cases, in some, the earliest, and in others the latest date being fixed, so as to do equity to all the parties in interest. Equity demands good faith; it seeks to preserve confidence and uphold credit. It does what it can to effectuate the reasonable expectations of prudent men, and, in adjusting the rights of contending parties, so proceeds as to realize, if possible, to contracting parties that which they had a right to anticipate when making their contracts or investments or giving their credit.

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In this case, Stanton began selling lots immediately after his purchase, and continued selling down to the time of the filing of the bill to enforce the vendor's lien. Some persons even purchased after the decree of sale. He began immediately also to improve a part for himself and for the terminal and shop facilities of the Alabama Railroad, then in process of construction, in which he was largely interested; by all which, as well as by the consequent and attendant growth of the city, the value of his purchase was very greatly enhanced. Shortly after the purchase he had paid \$40,000 of the price, and there is no doubt that sub-purchasers took these facts into consideration, as they had a right to, when buying from Stanton. If the purchase money were entirely paid, then their purchases would be discharged from the vendor's lien, even though Boyce should delay the transfer of title. If it were only partially paid there would be a ratable abatement of the lien.

If Stanton should always hold enough in value of the property to satisfy the balance of unpaid purchase money, purchasers could buy from him with impunity, and pay him for their purchases.

If, therefore, on the day before the filing of the vendor's bill, Stanton sold a lot, retaining, however, portions of his purchase from Boyce, sufficient then, or at any time thereafter, to satisfy the vendor's lien, the purchaser from Stanton would be perfectly secure in his purchase, under the settled rule of equity expressed in the chancellor's decree aforesaid, viz: that among sub-purchasers the last shall be first and the

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first shall be last liable for the satisfaction of the common lien upon their purchases, even though Stanton had subsequently sold all the rest of the tract. And if Boyce, with notice of said purchase, had released his lien on the part still held by Stanton on the day of said sale, either before or after Stanton sold it, that would have entirely discharged from his lien the lot bought as aforesaid on the day before filing the bill, and also all other previous purchases of which he had notice. Equity would not enquire what was the proportionate value of the part released to the entire property at the date of Boyce's sale to Stanton, nor consider that Stanton had, by his betterments, made one-tenth in value of his purchase worth nine-tenths of the whole, but would condemn the lots to sale in the reverse order of their alienation. The same rule would seem to apply to mechanics', attachment and mortgage liens, as to the equities of sub-purchasers. Because of the vast numbers of these and the difference of dates of acquiring liens by them, and especially of fixing the date of notice thereof upon Boyce, for convenience and equity the time for making such apportionment of value, in a case like the present, should be the date of the release; since if at the date of release, the property first liable, *i. e.*, that still held by the original vendor, is worth the entire debt, the release of that part of the property should discharge all the rest.

It is insisted for Boyce, who did not convey, but only gave bond for title to Stanton, that "nothing short of satisfaction of the debt or express waiver

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by deed will operate as a waiver of a vendor's lien;" and to sustain this comprehensive statement is cited Jones on Mortgages, sec. 232, in which is stated the familiar rules that the vendor's *lien*, not mere equity, is not waived by taking other security, nor by changing, substituting or renewing notes, nor by extending time or reducing notes to judgment. But in the same section the author says: "The vendor who has an *express lien* may, by his acts or declarations, waive it, as by inducing another to buy the property as unincumbered, or by permitting and encouraging the administrator of his vendee to sell the property to satisfy the lien and bidding at the sale." Neither of these would be a satisfaction of the debt or express waiver by deed; but either would as effectually waive the lien.

The Tennessee cases cited also to support the same view, have all been examined, and none of them contain an adjudication to support the proposition of counsel. The declaration of Chief Justice Catron in *Gillespie v. Bradford*, 7 Yer., 170: "Nor is a case recollected * * where the vendor was deprived of his legal title without having received his purchase-money," we do not think was intended in the broad, unlimited sense given it by counsel. Besides, it was employed in arguing the relative superiority of vendors' and mechanics' liens, and the only point therein adjudged was that the statutes of 1825 and 1829, giving mechanics liens for material and labor, did not prefer them to vendors still holding the legal title. It must, therefore, be treated as a mere *obiter dictum*.

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Nor does it gain the force of law by being quoted and repeated by Judge Hawkins in *Fogg v. Rogers*, 2 Cold., 295, for there the only question was, whether a vendor by mere title-bond waived his lien by accepting a mortgage on other property as additional security.

The other cases relied on to sustain the contention, are *Graham v. McCampbell*, Meigs, 52; *Anthony v. Smith*, 9 Hum., 511; *Hinds v. Perkins*, 2 Heis., 401; *Cleveland v. Martin*, 2 Heis., 131; *Burson v. Dosser*, 1 Heis., 754, and *Mulherrin v. Hill*, 5 Heis., 59. All these concur in declaring the *status* of a vendor still holding the title to be identical or of equal dignity with that of a mortgagee. This cannot be questioned. But the volumes of equity reports abound with cases in which mortgagees were decreed to have waived or released their liens from all or a part of the mortgaged premises without having received satisfaction or given written waiver or discharge to the debtor; and the text-writers concur in stating that this may be done: 2 *Leading Cases in Equity*, 271; *Jones on Mortgages*, secs. 722-32 and notes.

The sales ordered in 1873-4 were delayed for divers reasons and causes, chiefly on account of the urgent importunity of Stanton, and the hope of others that by negotiation and sale outside he might save all parties from loss, and possibly retain something for himself out of the property, until September, 1877, when the master, on the 17th, began enforcing the decree of sale. On that day he received from Boyce, in New York, the following telegram: "I

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am expecting payment every hour of several thousand dollars for costs, taxes and vendor's lien upon Stanton addition. Postpone sale from day to day until further notice. Jas. P. Boyce, Executor." Sales of a large number of smaller lots, and some valuable ones, were slowly made from day to day, leaving, however, the hotel and railroad property, the only parts still held by Stanton, yet unsold; and on the 22nd the counsel of Boyce, who was with him in New York, and who was evidently informed each day of the sales made, sent the master the following telegram: "Swann promises eighty-four thousand dollars to-day. If sale goes on will not get it. Boyce demands postponement till Tuesday. Answer quick. Tomlinson Fort."

The demand for delay was made for the purpose of enabling Boyce, Stanton and Swann to consummate their negotiations in New York in regard to the railroad property, and was acceded to by the master only after six-sevenths of the other creditors had expressed in writing their consent, and bonds of indemnity had been given him by Stanton and Crutchfield and Stanton and Boyce. The full significance of these telegrams and the consequent delay can be seen better after a brief summary of Stanton's railroad operations.

Before the purchase from Boyce, he had been interested in and acting for the Alabama & Chattanooga Railroad Company, and immediately after the purchase he laid off about twenty-four acres of the sixty-nine and a half for the use of the railroad, and erected thereon a depot, shops, etc., using the money of the

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company therefor. For this, doubtless, and perhaps for other things, the company was his creditor, and probably had a lien upon or equity in this twenty-four-acre tract. The company may also have been his debtor for services, etc., and the account between them very difficult of accurate computation and adjustment. For Boyce it is insisted that these old accounts must be considered in ascertaining the relation of the parties and determining the extent of interest held by Stanton in this property. This is not feasible nor necessary. The railroad had become bankrupt, and been so adjudicated in the Federal Court at Montgomery, Alabama. It was placed in the hands of receivers of the Federal Court at Mobile at the foreclosure suit of the first mortgage bondholders; and not only had the accounts been matter of adjudication in the bankrupt suit, but the receivers of the road had, by authority of the court, purchased these twenty-four acres from Stanton at \$240,000, thus recognizing his ownership as against the company. Besides, at the sale of the road, its rights, credits, franchises, etc., under decree of the Federal Court at Mobile, on January 22, 1877, in the foreclosure suit, Stanton had become the purchaser thereof, and if any right, claim or interest remained in the company on this land, or against Stanton, or in his favor against the company, there was a merger by this transaction; and the former equitable interest of the company in this land was absorbed by Stanton; the same must, therefore, be treated as his property, according to his purchase from Boyce, as it was so regarded by all

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the parties in their proceedings and dealings in regard to it: Pom. Eq. Jur., secs. 789-90.

In September, 1876, before Stanton had bought the railroad, the master, on the eve of sale, had been stopped by order of the chancellor on Stanton's petition and the almost unanimous consent of the creditors, other than Boyce, who kept silent—they seeming to agree that, as to all of them, a forced sale would be a ruinous sacrifice of the property, and profit only the vendor with the prior lien. Boyce's peremptory demand for delay a year later, when, so far as the record then showed or the other parties knew, his lien was as good as ever, may be accounted for on the events following Stanton's purchase of the railroad by his agents, Wilder & McMillin, which are recited in the documents of which the following is the substance:

Whereas, At a sale of the Alabama & Chattanooga Railroad and property and appurtenances, made on the 22d of January, 1877, by commissioners appointed by the Circuit Court of the United States at Mobile, under the decree of said court, John T. Wilder and D. C. McMillin became the purchasers of the same at and for the price of \$600,000, Stanton agrees and binds himself to Swann, that he shall be substituted as the purchaser of the said railroad and other property in the stead and place of the said Wilder and McMillin, and that the said court shall confirm such substitution and vest in Swann the title and interest in said railroad and other property, on his complying with the terms of said sale; and that he, Stanton, will, on delivery to him of the bonds hereinafter mentioned, make or cause to be made and delivered to Swann, good and legal titles in fee simple of the said 24 4-15 acres

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of land; and that he will, on the delivery of said bonds, deliver to Swann all the receiver's certificates that were received from them by him on account of the sale by him of said lots to said receivers, which have not been accounted for by him to the said court; and that he will, and does hereby release, all claims and demands held by him against said company or its property.

And the said Swann hereby agrees and binds himself to pay to Stanton eighty thousand dollars in cash, sixty thousand dollars in twenty days, sixty thousand dollars in sixty days, and fifty thousand dollars in ninety days, all from this date; and that he will organize and form a new company and corporation within ninety days from this date; and that said new company shall issue and deliver to the party of the first part, within ninety days from this date, its bonds to the amount of four hundred and thirty thousand dollars, payable thirty years from their date, with interest coupons attached at six per cent. per annum, also payable semi-annually, which bonds and coupons shall be secured by a first mortgage on the said railroad and other property owned by said new company. Executed in duplicate, this 31st day of March, in the year of our Lord 1877.

J. C. STANTON,
JOHN SWANN.

The said parties, for the same consideration expressed in the said original contract, mutually agreed as follows, in modification and change and addition to the said original contract:

1. Said John C. Stanton agrees to receive from said John Swann in payment of balance due and unpaid under said original contract, two hundred and eighty-five thousand (\$285,000.00) dollars in the kind of bonds mentioned in the original contract, in full payment and satisfaction of all claims and demands remaining unpaid against the trust

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fund in the Alabama & Chattanooga case, mentioned in said original contract, and to retire the evidences of said claims and demands, and to deliver the same to the said John Swann, on receipt of said two hundred and eighty-five thousand dollars in bonds, the said payment of bonds and delivery of evidences of claims and demands to be made as soon as practicable within sixty days after the date hereof, and when said J. C. Stanton makes title to the lands in Chattanooga mentioned in said original contract.

Witness our hands, this 19th of June, 1877.

J. C. STANTON,
JOHN SWANN.

And again:

First. The said John C. Stanton agrees to release and does release the said John Swann from performance of the last contract in writing between said parties, dated June 19, 1877, to the extent of eighty-five thousand dollars of bonds, and to accept two hundred thousand dollars of said bonds mentioned in the last named contract in full satisfaction of what is due to him under and by virtue of the two contracts subsisting between said parties; and the said John C. Stanton further agrees to deliver to said John Swann a good and perfect title to the land at Chattanooga, Tennessee, on which the depot buildings of the Alabama & Chattanooga Railroad stand, the same land that was purchased by the receivers in the case of D. N. Stanton and others against the Alabama and Chattanooga Railroad Company and others, and mentioned in the two said contracts: and said J. C. Stanton acknowledges that, on receipt of said two hundred thousand dollars of bonds, he will be fully paid for said land and for all his claims of every kind and description against the trust fund in said cause, and said John C. Stanton hereby pledges to said John Swann the said two hundred thousand dollars of bonds; and the said John C. Stanton further agrees that, on receipt of the loan money to be made him by said John

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Swann, as hereinafter provided, he will deliver to said Swann all receiver's certificates received by him for said land, and for which he has not accounted to the court.

Second, In consideration of said agreement of said J. C. Stanton, said John Swann agrees to deliver to said John C. Stanton, within ninety days from the date hereof, two hundred thousand dollars of the kind of bonds mentioned in the two subsisting agreements aforesaid between said parties, subject to all the provisions of this contract; and said John Swann further agrees to loan on the pledge of said two hundred thousand dollars of bonds, which said bonds are to be deposited with Plock & Co., No. 51 William street, New York, the sum of one hundred thousand dollars in cash for the period of four months from date, without interest, said Swann to have power to sell, at public or private sale, said bonds for his reimbursement, in case of default in the payment of said loan at or after the expiration of said four months, said sale to be with or without notice; said loan of money is to be made on the 22nd instant, before eleven o'clock, A. M. Six hundred thousand dollars of said bonds shall be kept and reserved by Plock & Co., for the purpose of discharging the balance of said court liens, and only for such purpose; all over and above said six hundred thousand dollars of bonds may be disposed of as said John Swann may see fit. In witness whereof said parties hereto set their hands, this 21st day of September, 1877.

J. C. STANTON,
JOHN SWANN.

One week before the execution of this last modification of contract, and in pursuance of the request of Stanton, and with consent of Crutchfield, given ten days before, Boyce made a deed to Swann, of which the following are the material parts:

Whereas, heretofore, to-wit: on the 11th day of Jan-

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uary, A. D. 1870, I, James P. Boyce, as the executor of the estate of Ker Boyce, deceased, made and executed a title bond to John C. Stanton, for a certain piece or parcel of land, described in said bond;

And Wm. Crutchfield admitting that John Swann has paid to him for and on account of the said John C. Stanton the sum of twenty thousand dollars, which he (the said Wm. Crutchfield) has accepted as a payment *pro tanto* upon the one-eighth of the proceeds of the sale made to said Stanton, as aforesaid, and which payment is a credit to said Stanton upon his purchase aforesaid;

And the said John Swann having paid to me for and on account of said Stanton the sum of twenty-five thousand dollars (\$25,000), which I accept as a credit to the said John C. Stanton upon his purchase aforesaid;

And the said John C. Stanton having directed and requested me in writing under his seal, and the said William Crutchfield having consented thereto and concurred therein, I do hereby, for myself and as executor aforesaid, in pursuance of said request and consent, transfer and convey unto John Swann, of London, England, a piece or parcel of said land containing twenty-four and four-fifteenths (24 $\frac{4}{15}$) acres, upon which the machine shops, round house, depots, new passenger sheds and tracks of the Alabama & Chattanooga Railroad Company in the city of Chattanooga, Tennessee, are situated, sold by the said John C. Stanton to the receivers of said railroad company under various orders, reports and decrees had in the Circuit Court of the United States for the fifth judicial district of the United States and southern district of Alabama, at Mobile, Alabama, in the cause of D. N. Stanton and others, trustees, etc., against the Alabama & Chattanooga Railroad Company and others, and being a portion of the land sold by me to the said John C. Stanton;

To have and to hold unto the said John Swann, his heirs and assigns, in fee simple forever.

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And I do covenant with the said John Swann, his heirs and assigns, in my capacity as executor of the last will and testament of Ker Boyce, deceased, that I am lawfully seized of said land, and that I have a good right to convey the same; that I will warrant and forever defend the title to the same against all persons claiming through or under me, or under the will of my testator, Ker Boyce, deceased; but I do not warrant the title to said land against any claims of any kind or nature whatever, that may have arisen from taxes of any kind that may have been assessed against said land since my sale to said Stanton, on the 11th day of January, A. D. 1870, nor do I warrant against any claim or lien that may have been fixed upon the equitable interest of said John C. Stanton in the said twenty-four and four-fifteenths acres of land herein conveyed by me since my sale to said Stanton; and I do hereby expressly retain, and do not release, my lien as vendor upon the remainder of said land sold by me to said Stanton; but said twenty-four and four-fifteenths acres is not discharged and free from any lien I may have had as vendor.

And it is further expressly agreed between and among the several parties to this deed, and all others who have assented, or may assent thereto, that if, at any time, or for any cause, this deed shall be ascertained or adjudged to be or to have become inoperative, in whole or in part, to protect the said grantee, John Swann, in the undisturbed enjoyment of the title or possession of the property hereinbefore conveyed to him, then, and in any such event, the said John Swann, or those claiming under or through him, shall be deemed and treated in all respects as the assignee or assignees of the vendor's lien on the land hereby conveyed, now owned by said J. P. Boyce, executor, as aforesaid, William Crutchfield and Harriet L. Gaskill, executrix of James A. Whiteside, deceased, and of the decree declaring and establishing those liens rendered by the chancery court of Hamilton county, at Chattanooga, Tennessee, in the

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causes in that court, which were consolidated and known by the name and title of The State of Alabama against the Alabama & Chattanooga Railroad Company and others, to the amount and extent of the several sums which the said Boyce and Crutchfield have received out of the means and funds furnished or advanced by said John Swann to obtain this deed, and as is hereinbefore set forth. And the said John Swann shall in any such event as that above mentioned, be entitled to enforce said lien or decree *pro tanto*, precisely as said Boyce and Crutchfield could have enforced the same at or before the execution of this deed; and every part of the funds or money received by said Boyce and Crutchfield, as above mentioned and shown, as any part of the inducement to execute this deed, is received subject to this agreement and upon the distinct understanding that it is not received as a discharge of said lien or of said decree to any extent, unless this deed proves to be and continually operates as a complete investiture of the said John Swann with a perfect title to the lands hereinbefore conveyed to him, and with the undisturbed enjoyment of the same. But this agreement is not to be in any manner construed so as to make said twenty-four and four-fifteenths acres liable for any sum or sums of money the said John Swann may have heretofore paid the said John C. Stanton.

This, the 14th day of September, A. D. one thousand eight hundred and seventy-seven.

JAMES P. BOYCE, [*Seal.*]

Executor of the estate of Ker Boyce, deceased.

The order of events will show the relation of the parties and their means of knowledge in regard to these September transactions.

On the 4th Stanton made his request and Whitesides gave his consent, that Boyce execute the deed for the railroad property to Swann.

On the 14th Boyce executed the deed.

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On the 17th, the day when the master began his sales, Boyce sent the telegram requesting postponement from day to day; but the sale proceeded slowly until the 22d.

On the 21st was made the last modification of the contract between Stanton and Swann.

On the 22d the "demand" telegram was sent by Fort for Boyce, and the master accordingly adjourned sales until the 25th.

On the 24th, the deed from Boyce to Swann for the twenty-four-acre tract, was placed of record in the register's office at Chattanooga.

On the 25th the master again postponed sales, so as not to reach the hotel and railroad property, until the 26th.

On the 26th, nearly all the creditors having signified their consent in writing that the further sale, *i. e.*, the sale of the property last aforesaid, be deferred till after the next term, and the master being informed of the payment by Stanton of from eighty to one hundred thousand dollars on vendor's lien, the further sale was postponed, and so reported.

On the 28th, closely following these transactions, Boyce and Stanton make a contract containing extraordinary and peculiar stipulations not requiring notice, by which Stanton assigns to Boyce his interest under his contracts aforesaid with Swann; and they mutually covenant and agree that the transfer shall be void upon the following conditions. That is to say:

1st. If the said Stanton shall indemnify and save harmless the said Boyce from any liability to any person or per-

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sons by reason of the execution and delivery of the deed to John Swann for the twenty-four and four-fifteenths acres of land, and shall pay and satisfy any judgment or decree which may be recovered in law or equity against the said Boyce, either in his own right or as executor of Ker Boyce, deceased, by reason of the execution and delivery of said deed to said Swann, and of the covenants contained therein.

2nd. If the said Stanton shall indemnify and hold harmless the said Boyce for any loss or damage, and shall pay and satisfy any judgment or decree which shall be rendered against the said Boyce, by reason of the execution and delivery to T. M. McConnell, clerk and master of the said chancery court of Chattanooga, of the bond of indemnity bearing date of September 26th, 1877.

3d. If said Stanton shall pay and satisfy two promissory notes, and shall pay to Boyce interest at the rate of eight per cent. per annum, instead of at the rate of six per cent. per annum, upon the aforesaid two notes for ten thousand dollars and fifteen hundred and twelve dollars and fifty-seven cents.

4th. If the said Stanton shall pay to the said J. P. McMillin two and one-half per cent. upon the purchase money of the said Stanton's addition in the city of Chattanooga, sold on or about January 10, 1870, as aforesaid, with interest thereon from that date.

5th. If the said Stanton shall pay and satisfy all such claims, or judgments and decrees, of any court of competent jurisdiction against him for which he may be legally liable, and shall pay and satisfy any and all other claims, demands and equities to which the said Boyce may, in any manner, become entitled in law or in equity, and which may be lawfully due by the said Stanton, or which may be acquired, or in any manner obtained lawfully by the said Boyce any time before the final winding up and settlement of all the covenants, contracts and agreements contained

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in this instrument; provided, and it is hereby expressly agreed that any surplus of money or property which may remain in the hands of the said Boyce, or to which he may become entitled by reason of the covenants, contracts and agreements contained in this instrument, and also contained in the said transfer by the said Stanton, bearing date this day of the contract of the said John Swann and himself, after the full compliance with all the aforesaid covenants, contracts and agreements contained in this instrument, to be done and performed by the said Stanton, shall be paid to him, his executors, administrators, heirs and assigns.

In testimony hereof we have hereunto set our hands and affixed our seals, this the day and year first above written.

J. C. STANTON, [Seal.]

JAS. P. BOYCE, [Seal.]

The depositions of both Boyce and Stanton were taken after this contract, on a reference to ascertain what amount had been paid on the vendor's lien, and in answer to inquiries upon that subject propounded by the master, neither of them make reference to this contract as a payment absolute or conditioned upon the purchase price, or as affording any means of payment, certain or contingent thereon. It was at this time that the master's report was made of a balance of about \$56,000 of purchase-money above referred to. The order of sale was revived in November, and a few lots of Stanton's sold, when, by consent of the creditors, another postponement was made before the hotel and railroad property was reached.

At the April term ensuing were entered two consent decrees in the causes, the first of which does not demand special attention; the second is as follows:

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With a view to compromise and diminish the chances and prospects of litigation in so far as possible in relation to the property attached, and on which liens have been decreed in said causes, etc., all parties in these causes, who have either liens or decrees, appear in person or by their respective attorneys or solicitors, and admit that the twenty-four and four-fifteenths acres of land in the city of Chattanooga, Tennessee, upon which are situated the depots, tracks, shops and other improvements of the Alabama & Chattanooga Railroad Company, and which was conveyed by John C. Stanton and J. P. Boyce, executor, etc., respectively to John Swann, September, 1877, has out of the fund arising from the sale of said twenty-four and four-fifteenths acres to John Swann, contributed and paid its full portion of the liens upon the sixty-nine and a half acres of land sold by the said Boyce, executor, etc., to J. C. Stanton, of which said twenty-four and four-fifteenths acres is a part, and the said twenty-four and four-fifteenths acres should in equity be discharged from all liens thereon under proceedings in these causes—except the lien for taxes due thereon.

It is therefore decreed by agreement of parties aforesaid, that all liens existing on said twenty-four and four-fifteenths acres—except the lien thereon for taxes, are released and removed therefrom, but this release is in no wise to affect, alter or diminish the liens, rights or priorities of the parties under the decree heretofore rendered in these causes as to the remainder of said sixty-nine and a half acres, or any other property upon which they have liens.

But the same shall be and remain upon all property as fully, completely, and to the same extent, and with the same priorities and rights as heretofore decreed. But no rights or equity existing heretofore between parties of this suit or litigation shall in any manner be abridged or disturbed by this agreed decree. But each shall have all the rights, equities and remedies against the others touching

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the collection of their decrees or enforcing their rights and equities in relation to each other, and against each other as to all the other part of the said sixty-nine and a half acres of land not covered by the said twenty-four and four-fifteenths acres, that they ever had. The only thing they release is the decreed liens and the liens fixed by attachments on the said twenty-four and four-fifteenths acres itself. And this release is not to have any reference to the proceeds of the sale of the same, or the rights of any one thereto, or the liability of any one therefor.

And nothing in this agreement and decree is to be so construed as to waive any lien of the State and county, or the mayor and aldermen of the city of Chattanooga for taxes assessed on any part or upon the whole of said twenty-four and four-fifteenths acres, nor demand upon the rightful party or parties to pay such taxes as remain unpaid. Nor is the same to be construed so as to prevent any one from contesting the legality or excessiveness of the levy of such taxes or the right to have each lot or piece pay its own tax.

It is further decreed by the court that in making the sale heretofore ordered of the unsold lands, the master will not sell the said twenty-four and four-fifteenths acres, except for the taxes due on the same, and the parties have four months from the date thereof to pay the taxes due on said twenty-four and four-fifteenths acres to the parties entitled, or into the office of the master for them, and if paid into the office the master shall pay the same out to the parties entitled thereto.

The claim of J. R. Taylor is not embraced or affected by this decree. Nor is the claim of S. B. Moe to be affected by or included in this decree.

On April 20, three days later, *the sub-purchasers and holders of their notes* appeared and procured to be entered of record, "that they did not, and do not

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consent to said decree, but protest and except to the same."

J. A. Caldwell, former clerk and master, also excepted to the decree.

The entry also contains, on behalf of one who had been decreed a part of the purchase-money, and had joined in the deed to Swann, and was also a large creditor, the following: "And W. Crutchfield also excepts to said decrees so far as the same may in any way affect his rights and priorities as heretofore decreed in his favor in the consolidated causes."

On the same day the court adjourned. Nine days later, on April 29, when the closing day's minutes were being read for approval and signature, Boyce, by his solicitor, appeared and sought to have also entered an order withdrawing his consent to said decrees as to all parties who did not give their consent, and giving notice that as to them he would insist on all his previous rights. This the chancellor properly refused, since court was not in session; thereupon Boyce filed his bill of exceptions thereto.

Obviously these protests and exceptions did not in any way affect the validity of the decrees. The record imports absolute verity, and the parties may not contradict its recitals. It recites that certain parties appeared and admitted certain facts, and therefore, by agreement of parties, certain things are decreed; that is, the parties described make an agreement in open court, not only as to what the facts are, but also what are the legal consequences. It is a written judicial contract, duly acknowledged and

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executed, and conclusive upon the parties. It may be impeached and rescinded for fraud in its procurement; but otherwise it must stand. The parties may not appeal from it, or otherwise correct its errors. They may not recede from it, or withdraw their consent to it. Of course protest and exception avail them nothing (*Dillard v. Harris*, 2 Tenn. Ch., 196.), except as mere notice of the dissatisfaction of the parties so protesting and excepting. The amended and supplemental bills and proof show no sufficient reason for setting aside these decrees, and by them, therefore, the rights of the parties thereto must be determined.

The decree of April 15 merely contains the admissions of certain parties named that their debts have been satisfied, and of others that they have waived and released their liens and claims upon the twenty-four acre tract, and an adjudication accordingly, with an express reservation of all other rights and liens they may have in the cases on other property; and it does not affect the vendor's lien.

By the decree of April 17, "all parties in these causes *who have either liens or decrees*," admit that the twenty-four acre tract "has contributed and paid its full portion of the liens" on the entire tract, "and should in equity be discharged from all liens, except the lien for taxes," and it was accordingly so decreed, expressly reserving the liens on all other property in the causes. It is first to be noticed that this is not a consent decree as to all parties, but only all "who have either liens and decrees;" and the

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decree recites: "The only thing they release is the decreed liens and the liens fixed by attachment on the twenty-four and four-fifteenths acres itself." Taylor and Moe only are excepted.

Neither the sub-purchasers nor their note-holders had "either liens or decrees," and so could not release "decreed liens or liens fixed by attachment." They are not, therefore, parties to the decree, nor to be regarded as consenting to the release, (*Dillard v. Harris, supra*; *Penniman v. Smith*, 5 Lea, 136), and all parties interested were so expressly notified by their protest, if the terms of the consent decree were not themselves sufficiently explicit, though to us they certainly appear so. By this decree Boyce released his vendor's lien from the twenty-four acre tract. What effect did this have on the rights of the sub-purchasers and their note-holders? For Boyce it is strenuously urged that Stanton had dedicated this tract to railroad purposes, had used the railroad money in improving it, and the railroad company were in open possession before the other purchases, and so had an equitable right joined with occupation; and therefore, though he had never actually sold or conveyed it to the company, this tract was liable under the decree of sale only after all the lots of sub-purchasers, and therefore they are not affected by the release. This is ingenious; and if the railroad company were here asserting this right, it might prevail upon the grounds stated, if other conspicuous facts were ignored. But the company makes no such claim: the old company (the Alabama & Chattanooga) appears here bankrupt,

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and probably entirely defunct; Stanton had bought its property and rights, and thus merged the claim; and besides, all the parties interested in the sale, Boyce included, up to the time of the sale and release, treated this as the property of Stanton, and hence liable before that of his sub-purchasers. They have, therefore, the right to demand that the value of this property so released by him, be, as to them, credited upon his vendor's lien decree. Boyce claims that this credit should be for only \$48,000, the amount for which he sold it to Stanton in the general purchase at \$2,000 per acre, and thus the recognized value at that date; and for this he relies on the opinion of Chancellor Kent in *Stevens v. Cooper*, 1 Johns. Ch. R., 425, in which such a principle was recognized and followed upon the doctrine of contribution among the various purchasers from a mortgagor after the mortgagee had released a part of them. We doubt if this doctrine of contribution would find recognition in our equity jurisprudence in cases of this character, except in case of contemporaneous purchasers from the vendee or mortgagor. Certainly it does not apply to the present case, where the contention is in effect between the first vendee and his sub-purchasers. With us equity requires the exhaustion first of all the land unsold in the hands of the first vendee before resorting to that of the sub-purchasers. And the value of that released is the measure of the credit on the purchase-money which the sub-purchaser may demand as against them in a case like this.

It is important, therefore, to correctly fix the value of

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the twenty-four-acre tract sold by Stanton, and conveyed by Boyce to Swann at the date of the deed; and we cannot but regret the absence of clear and specific proof upon the subject, and the necessity of resorting to inference. The decision of the case, however, requires this value to be declared, and we must estimate it upon such evidence the parties have been content to offer.

It appears that Stanton sold the tract in 1873 to the receivers of the Alabama & Chattanooga Railroad Company, with the approval of the court at the price of \$240,000. In 1874 and 1875, during the financial depression consequent upon the panic of 1873, the property was assessed for taxes at \$125,000, which valuation the chancellor, without declaring what was the worth of the property, held was so low that even the tax-payers had no ground of complaint. In 1879, certain mechanics in a petition insist that it could have been sold for at least that sum at any time on forced sale, as we understand. The separate price is not expressed in the contract between Stanton and Swann, the whole sum to be paid to Stanton for this property and the railroad together being \$250,000 in cash and \$430,000 in bonds. Allowing \$80,000 to reimburse Stanton for his cash payment on the railroad, and there remains \$600,000 for purchase-money to Stanton for both. There is a conspicuous absence in the testimony of Swann and Stanton of the ratio in which this was apportioned between the two properties; and counsel for Boyce say it is preposterous to assume that \$240,000 of it was for the

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twenty-four acres with the depot, round-house, machine-shops, etc., and only \$360,000 for a railroad three hundred miles long. And so, perhaps, it would be. But that is not the price of the railroad. Stanton only sold to Swann his bid on the road, Swann assuming his liabilities for unpaid purchase-money, and Stanton agreeing to discharge certain liens and incumbrances in favor of his brother, D. N. Stanton, and others, the amount of which is not stated. The \$600,000 thus represents the purchase-money of the twenty-four-acre lot and buildings, and a *bonus* to Stanton for his railroad bid, and the liens of his friends thereon. Boyce, Stanton and Swann seem to prefer to withhold the estimate of the value of the lot in the purchase, by saying, merely, that it and the railroad were estimated together, and sold in mass for a gross price. Since the parties interested to show that the purchase price of this lot, or its fair value at the date of sale to Swann, was less than the sum which the receivers were authorized and agreed to pay Stanton for it in 1873, or that it has decreased in value, or was any less necessary to the railroad when Swann bought than before, and since the purchase by him was for the same use as that by the receivers, we feel warranted in the inference that the price of it to Swann was not less than to the receivers, and therefore appraise it at \$240,000, which was enough to satisfy, together with Stanton's other unsold property, the lien of the vendor and other attaching creditors, after paying costs and taxes.

We hold, therefore, that the lots of those sub-

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purchasers, who were parties as such to the consolidated causes at the time of the consent decree aforesaid, or of whose purchases notice had been taken by report, order or decree in the cause before that time, are, by Boyce's release of said twenty-four acre lot, discharged from the lien of Boyce as vendor, and as to them his lien is satisfied.

As between the vendor and the attaching creditors and mechanics and others, who had liens on the property subordinate to the vendors, the same reasoning does not apply for the reason that they all consented to the release of the twenty-four-acre tract. Their rights, therefore, must be determined on other grounds.

As we have seen, in virtue of the decrees of 1873 and 1874, they and Boyce stood in the relation of second and first mortgagees to each other. Thus standing, both parties agree in admitting that the twenty-four-acre tract "has, out of the *fund arising from the sale to John Swann*, contributed and paid its full portion of the liens" upon the entire tract.

At the date of this decree there had been paid upon the liens out of this fund the following sums:

To Crutchfield on vendor's lien.....	\$18,372
To Boyce on vendor's lien.....	72,000
To Montague & Champion for taxes.....	18,916
To Sundquist and other attaching creditors, say.....	40,000
Making a total of about.....	\$150,000

The admission was probably made upon the idea that all the liens were to be apportioned upon all the lots; this, however, was not only unwarranted by our doctrines of equity, but was directly in the face

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of the decree of 1874, adjudicating the primary liability of the lots unsold by Stanton, of which this twenty-four-acre lot was one. They thus released property worth about \$240,000 on the payment by it of about \$150,00, providing between themselves, however, in the decree as follows: "But no rights or equity existing heretofore between parties to this suit or litigation shall in any manner be abridged or disturbed by this agreed decree. * * * The only thing they release is the decreed liens and the liens fixed by attachment on the twenty-four and four-fifteenths acres itself. And this release is not to have any reference to the proceeds of the sale of the same, or the rights of any one thereto, or the liability of any one therefor."

The obvious intention of the parties here is to confer upon Swann an encumbered title, but not to disturb the relations existing between themselves under their respective liens by decree. Boyce was at this time the assignee for Stanton of the unpaid balance of purchase money; and he now insists that the parties were dealing at arm's length, and he had the right, after the release, to apply this purchase-money as his own to any use he chose; while for the other creditors it is contended that he occupied a trust relation toward them, and so could not deal with the fund to his own private advantage, but must apply the same to the satisfaction of the debts of the creditors in the order of their priority.

At the time of the assignment of this balance of purchase-money to Boyce, the relation he held as first

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mortgagee had not been at all affected by releases or agreements of release. Stanton's insolvency, or at least his inability to discharge these debts otherwise than out of the proceeds of this sale, was known to all. On this account, and to give him opportunity to raise the money for this purpose, the sale had been so long delayed. True, it was more to the advantage of others than of Boyce. Yet so deep was his interest in it that he had by telegram *demand*ed the postponement. The parties to the suit had been assured by Stanton that the purchase-money of this lot would pay all his debts, and they expected their pay out of it. Boyce, as a party to the suit, permitting all these delays, could not, with his resident solicitor, have remained in ignorance of this. As a prudent executor, watching the interests of the legatees, as well as his own, and guarding against laches, he must have known of the delay, and of the causes of it. He denies having seen Stanton's petitions for delay filed in the cause or known of their contents; and we accept the denial as true. But that is not a denial of his knowledge of the facts on which Stanton asked, and his creditors, including Boyce himself, granted delay, and the purpose for which it was granted. It was the understanding among all parties that this fund, when realized, was to be applied to the discharge of Stanton's debts; and it was the duty of any party into whose hands it came, therefore, to so apply it. Stanton himself should have so used it. He had expressly promised to so apply it. Nor had Boyce

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a right to receive it for other purposes. The mutual understanding of all parties had stamped upon it the character of a trust: Perry on Trusts, secs. 112, 166; and the party taking it in custody, with notice, became *ipso facto* a trustee: *Id.*, sec. 217. For whatever purpose Boyce took the assignment, the fund became in his hands primarily a security for the payment of his debt, and he was bound in equity and good faith so to apply it: Jones on Mort., sec. 728. And the right of the junior creditors could not be defeated by any arrangement between Stanton and Boyce: *Id.*, sec. 732.

But Boyce, as successor of Stanton in this implied or constructive trust, cannot be charged with Stanton's malversations, if there were any. We need not, therefore, inquire whether Stanton used all the money he received of this fund in paying liens, or converted some of it to other uses. Boyce was not his surety for faithful performance, and is only liable for so much of the funds as came to his own hands. What he received was \$200,000 in bonds on deposit with Plock & Co., brokers, subject to certain demands against it for various liabilities of Stanton, referred to in the last contract between Swann and Stanton. The first was a loan of \$100,000 by Swann to Stanton made on pledge of these bonds. This was repaid by an actual sale in open market of one hundred and fifteen bonds for the purpose. Boyce cannot therefore be charged with these. Of the remaining eighty-five bonds, twenty-three were claimed and retained by Swann to indemnify him against twenty-

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three receivers' certificates of \$1,000 each, which, with others, Stanton had received from Rice & Haralson, receivers of the Alabama & Chattanooga Railroad, on his sale to them, in 1873, of this twenty-four-acre tract for the use of the railroad; and these had not been accounted for as required.

The contract between Swann and Stanton contains a promise on Stanton's part to deliver to Swann all these certificates on receipt of the loan money. These twenty-three were not so delivered then, nor up to the date of final settlement. The contract expresses that the delivery of the two hundred bonds was "subject to all the provisions of this contract." This may fairly be held to include the promised return of the twenty-three receivers' certificates aforesaid; and in the condition of this record, we do not feel warranted in saying that it was improper for Boyce to permit the retention of an equal number of the bonds of equal face value for their redemption.

In the contract Stanton also agrees to deliver to Swann a good and perfect title to the twenty-four-acre lot. To accomplish this required that the liens in these causes be removed from it. In this way thirty-four bonds were used to reimburse Wolfe for sums expended at the request of Stanton and Boyce in buying up liens of Sundquist and others, parties to these suits. This, too, seems a proper use of these bonds in accordance with the requirement of the purchaser, and Boyce cannot therefore be charged with these, especially not since they were so applied before the fund came to Boyce's hands. This left

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twenty-eight bonds, which, on the settlement between Swann and Boyce, September 5, 1878, were delivered to Boyce, but on condition that he should discharge all liens for taxes, and also remove from the record the objections filed by Moe and himself, and also protect Swann against the claims of Watkins and Taylor, or return said bonds to Swann. Fourteen of the bonds were thus employed, leaving fourteen free from any claim of Swann in Boyce's hands. But the amount of the proceeds of these bonds paid by Boyce to protect and indemnify Swann against the claim of R. L. Watkins or Watkins & Co., whatever it may have been, should not be credited to Boyce unless it was paid on decree or judgment against him or Swann, as it appears from their bill that neither Watkins or Watkins & Co. had any "claim in respect to said twenty-four and four-fifteenths acres," their bill having been filed after the deeds to Swann and the assignment of the fund to Boyce. Neither does the fund seem to have been charged with the debt of \$1,700 paid R. Inge Smith.

These bonds it was his duty to apply to his purchase-money debt at their market value at the date they came to his hands, viz: 87 per cent. on September 5, 1878. To this should be added interest as accrued upon the bonds from the date of the assignment to Boyce till the settlement aforesaid between him and Swann, as was received by him. From the amount of Wolfe's claim, \$31,600.78, and the fact that thirty-four bonds at 87 cents reimbursed him, we infer that the accrued interest in coupons

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was transferred to Wolffe with the bonds, else he would have failed by about \$2,000 of making himself whole. In such case Boyce would not be chargeable with interest. But when he received it, and appropriated it to his own use, it must be credited upon his debt. In short, Boyce must credit upon his purchase-money debt the net amount of all funds received by him out of the proceeds of the sale to Swann, after discharging the incumbrances on the fund which Swann had stipulated for in the last contract between him and Stanton. This is the full meaning of the equitable demand against him in favor of Stanton and his subordinate creditors.

The suggestion of the bankruptcy of Stanton occurring in August, 1878, made in behalf of Boyce as an objection to this decree, is no obstacle to this appropriation of the fund. The assignee in bankruptcy has not appealed, and is not here complaining of such an appropriation. If he is content, surely Boyce may be and must be. Moreover, it is apparent that the assignee has no claim to this fund. It had been transferred to Boyce, and the only question is whether he held it as his own personal fund, or as a trust fund. In this the assignee has no interest. Equity treats that as done which ought to have been done, and thus merely regards these funds received by Boyce from Stanton before his bankruptcy as payments on his debt, and so applies them.

Nor is the plea of the statute of limitations of three years a bar to such decree. This is not rendered on an "action for the conversion of personal

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property," but a suit to compel an application of payments, and so is not within the language of the statute. And if it were within this class of actions, the complainants in the amended bills have therein waived the tort and sued only for the value of the property received, and so would not be barred: *Kirkman v. Phillips*, 7 Heis., 222. Besides, the suit probably belongs to that class of cases within the peculiar and exclusive jurisdiction of courts of equity in which they refuse to recognize and apply the statutes of limitation: St. Eq. Jur., sec. 1521 and notes; 4 Kent's Com., page 180.

As between Boyce and other creditors with decrees or liens, it does not appear that the vendor's lien is entirely satisfied. But after applying to the balance reported to be due by the master in October, 1877, the proceeds of the Swann purchase as hereinbefore directed, Boyce will be entitled to satisfaction of the residue out of the proceeds of the sale of the other parts of the sixty-nine and a half acres in accordance with the decree of the chancellor of May, 1873, and May, 1874, and in the order therein provided for.

After applying the sums so received by Boyce to the satisfaction of his lien, he will be entitled to receive next the proceeds of the sales of the other lots not sold or contracted to sub-purchasers by Stanton before the decree of May 19, 1873, as therein decreed, and thus his lien will be satisfied, or if not satisfied his right of satisfaction will be exhausted, and he must look to Stanton personally or his assignee

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in bankruptcy for any balance of purchase-money unsatisfied, as also for the other debts Stanton agreed to pay him out of the Swann fund.

The claims which Wolfe, as the agent and broker of Swann bought up, will be treated as satisfied out of the money of Stanton, and no longer existing as liens in favor of either the original creditors or their assignees. Since the fund was pledged for this purpose it must be regarded as so applied. The objection of Boyce that this cannot be declared in favor of the other parties because he alone has appealed, cannot avail. While the chancellor's decree declares Boyce entitled to hold these claims as assignee, it charges him with a much greater sum in favor of the other parties, wherein is included the sum used in buying up these very claims. The other parties had no reason to appeal. The appeal of Boyce brings up not only the question whether he was properly charged with these funds, but the inseparable one, whether the claims bought with them were his property or were satisfied. The reversal in his favor as to the fund requires also a reversal as to claims.

Next in order, after Boyce, comes the lien of the mechanics and furnishers. These of course lie only upon the particular lot on which were placed work or materials for Stanton. If possible, Boyce's lien must be satisfied out of the proceeds of lots on which there were no mechanics' liens; or if these must be resorted to for him, the encroachment must be in the inverse order of their liens, and his money must be taken out of the various funds so as, if possible,

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to leave enough in each to satisfy the mechanics' and furnishers' liens thereon.

It is contended for some of them that, as their liens were not upon the twenty-four-acre tract, but other lots, and were prior in date to the sale to many of the sub-purchasers, the rule of sale in the reverse order of sub-purchase or incumbrance would require a resort to the lots of the junior sub-purchasers before coming upon their fund. Conceding this to have been the equity of the case at the date of the decrees of 1873 and 1874, and that those decrees are conclusive of the rights of the parties at that time, the order of sale prescribed in them cannot now be followed because of the change of rights brought about by the subsequent consent decree of release in 1878. The mechanics and furnishers are embraced within the terms "all parties in these causes who have either liens or decrees." They, therefore, consented to Boyce releasing the twenty-four acres from his lien. The effect of this, as we have seen, was to release the lots of sub-purchasers. It would have postponed Boyce to the mechanics also, but for their consent to it. The decree itself, however, provides expressly that "by agreement of the parties aforesaid," *i. e.*, the parties consenting, "this release is in nowise to affect * * priorities of the parties * * as to the remainder of said sixty-nine and a half acres." Having consented to the decree, the effect of which was the release of the lots of the sub-purchasers, the mechanics are estopped from now having these lots resorted to; and having agreed to preserve priority

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between themselves and other parties with liens or decrees, they must submit to Boyce's original seniority of lien. In case any questions of priority arise among them, or between them and other creditors or purchasers, in all cases where the bills have been filed within the year allowed by statute, their several liens have been placed, and will be so decreed from the date of furnishing materials or doing work under said contract. This includes the lien of Kinsey, assignor to Gillespie & Co., and gives it priority as decreed by the chancellor.

Next in order of satisfaction come the liens of the general creditors in the order of their several attachments. The equity of the sub-purchasers is still stronger against such of them as have no lien on particular lots, but only on Stanton's equity in the whole tract. They joined in releasing the twenty-four acre lot, the proceeds of which were probably sufficient to satisfy their debts in addition to the vendor's lien; certainly with the proceeds of the other unsold lots added, they would have been sufficient without resorting to the lots of sub-purchasers, or the notes given therefor. If, therefore, they had a prior lien over the purchasers, whose deeds were unregistered at the date of their attachments, they stood toward them in the same relation as did Boyce, and equity required of them, equally with him, that they should not release their security on property liable for their debt before the lots of the sub-purchasers, without crediting their debts with the value of their lien upon it at the date of the release.

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The language of this consent decree: "But no rights or equity existing heretofore between parties of this suit or litigation shall in any manner be abridged or disturbed by this agreed decree," is relied on to avert this release of the sub-purchasers. This seems to be merely an expression of the agreement of the consenting parties rather than the decree of the court. But if it be taken as a part of the matter decreed by the chancellor, it will still be regarded as applying only to the consenting parties. Language employed in parts of the decree as here, seems to include all the parties to the consolidated causes, and the consenting parties probably intended not to disturb in the slightest their liens on the other parts of the sixty-nine-acre tract. But the whole decree construed together is a consent decree; and, in the absence of the clearest expressions showing the chancellor to be decreeing upon a hearing of the causes, the decree must be taken as limited in its effect to such parties as are present, admitting the facts and consenting to the expressed legal effect of them. Such expressions do not appear herein; and, therefore, we hold the consent decree did not in any manner affect the rights of the sub-purchasers, nor operate to preserve former liens against the equitable consequences of the release then consented to and received.

Nor is this equity of the sub-purchasers weakened by the fact that the creditors did not intend to release their liens from the lots bought by them, nor in their consent decree contemplate that such would be the result of the release. It is not by

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their intention, but by the effect of their act, that the rights and equities of the parties must be determined. If they, or any of them, were mistaken, either as to the legal effect of this release of a part, or in trusting Stanton for the faithful application of the proceeds of the railroad lot, it is their misfortune, and cannot be visited upon the parties not participating in the mistake and release.

It is urged for the creditors that this relief cannot be given the sub-purchasers and their note-holders because they have not appealed. The decree of the chancellor was against Boyce, and afforded their lots ample protection. There was no necessity for an appeal on their part. The appeal of Boyce and the modification of the decree against them, puts their lots in jeopardy, and requires a consideration of the equities between them and the general creditor. The appeal of an unsuccessful defendant against all complainants will permit an adjustment of the equities between co-complainants in this court.

Nor would this equity be affected by the mere fact that some persons purchased *pendente lite*. The attaching creditors are to be regarded, after the decrees of 1873 and 1874, as second mortgagees of Stanton as to the whole sixty-nine and a half acres. Purchasers of a part, after a mortgage of the whole, are treated with the same consideration as those purchasing before, whose titles were unregistered and unknown. The mortgagee may not release a part to their prejudice, provided he have notice of their purchases. Notice to the mortgagee is essential to

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the existence of this equity of the sub-purchaser. The consent decree of release, therefore, is a protection to all sub-purchasers, whose purchases were known to the attaching creditors, or of which they had constructive notice: Jones on Mort., sec. 723.

Registration has been uniformly held not to be notice of such purchase to a prior mortgagee, since he is not bound to be constantly investigating the register's books for subsequent transactions between his debtor and third persons: *Ibid.* But record evidence in these consolidated causes, as by bill, petition or answer, order of record, or purchase at a master's sale, under order in these causes, and confirmation thereof before the release, would be constructive notice to the general creditors and to Boyce; and the equity resulting from the release would inure to the benefit of such purchasers *pendente lite*. Unless, however, they have become parties to the suit under such pleadings as to enforce this equity, their lots will not be exempted from sale to satisfy the claims of the creditors.

Stanton, however, sold many of these lots after he had been enjoined from selling them on the suit of some of the creditors. The purchasers were bound to take notice of this. The sales by Stanton were void certainly as to the parties who obtained the injunction (*Greenwald v. Roberts*, 4 Heisk., 500), as they were at liberty to disregard them entirely. The release does not discharge these lots from the superior claims of the general creditors.

It is urged for the creditors that the consent

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decree of release was made upon the express agreement that the proceeds of the sale of the twenty-four-acre tract should be faithfully applied to the discharge of the vendor's lien and the decreed liens of other creditors, and that Swann, Boyce and Stanton were all bound for this application of the fund. This is doubtless true as to Stanton. He admits, in his petition for delay of sale, filed September 12, 1876, that the sale to the receivers was to be confirmed only on that ground; and in his deed to Swann expressly warrants against these liens; his conduct and relation to the parties required it of him, as did also the fact that he received the purchase-money from Swann. But it is not true as to Boyce. No such express agreement on his part is shown. The consent decree contains no such agreement. On the contrary, the reason for the release is expressed in the admission that this trust has contributed its full share toward discharging the liens. The fund was not then in Boyce's hands, and he was not the surety of Stanton for the fulfillment of his promise. He is liable, as successor to Stanton, as constructive trustee, but only for the amount of the fund received by the assignment. Swann was no party to the suit, nor to the consent decree, nor to any such agreement as alleged, and not bound by any promise to see to the faithful application of the purchase-money. He was interested only in getting a good title. Stanton promised him this, and Swann retained part of the purchase-money to compel performance of the promise. Stanton obtained the release of the liens on the con-

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sent expressed as aforesaid; and him only can the disappointed creditors hold for the performance of his promise.

For the attaching creditors it is also insisted that by the deed to Swann on September 14, 1877, for the twenty-four acre tract, Boyce waived his vendor's lien as to junior lien creditors upon the residue of the sixty-nine and a half acres. This would, perhaps, have been the effect of that deed had he thereby released said twenty-four-acre tract from his lien as vendor. But the deed expressly says: "Said twenty-four and four-fifteenth acres is not discharged and free from any lien I may have had as vendor." The relation of these parties thus remained after the deed just as they were before it; and, therefore, this contention of the general creditors cannot be sustained.

The general creditors also insist that Boyce's lien should be credited with \$25,000 paid him by Stanton in May, 1877, as admitted by him in his deposition in the Duffy case. He admits the receipt of this sum in the spring or summer of 1877, but says it was embraced in the \$72,000 credited as of September following; and we see nothing in the record to contradict this statement and authorize a disregard of the master's report, unexcepted to in this point, in which this sum is so reported. The credit cannot, therefore, be allowed.

Nor can Boyce be denied credit for sums paid by him out of his own means on taxes accrued before January, 1877, on the ground that the payment was voluntary and officious. His contract with Swann

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bound him to discharge these tax liens as to the twenty four-acre tract; besides, they were a prior lien over all, and in the discharge of it all encumbrances were interested on all unsold parts of the sixty-nine and a half acres. It results from this, of course, that the holders of notes of sub-purchasers who bought from Stanton pending the injunction, as well as the sub-purchasers, must be postponed to liens of those creditors who had injunction against Stanton at the time of their purchases. Such note-holders as have priority, as well as all the creditors, must look to the proceeds of the sales of the property sold by order of the court instead of the lots themselves, the sales having been properly made, and the fund being still within the control of the court in these causes. The legal question as to whether the date of registration or of sale is to determine priority as between the sub-purchasers and creditors, which is otherwise difficult of solution, in view of our decisions sustaining a mere delivery of a title bond in preference to a subsequent attachment levied upon the land as that of the obligee making this parol transfer, and of our statutes requiring registration of all deeds of conveyance to give them validity against creditors, seems to be settled in this case as to all persons, and their privies, who were parties to the suit at the time of the decrees of May, 1873, and May, 1874. Both these decrees concur in fixing the order of priority according to the date of sale. These decrees are valid and unreversed; nor is this proceeding one in which they could be reversed, if erroneous. By them,

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therefore, all parties to them are concluded. And in view of the other adjudications as to the purchasers pending the injunction, who became parties after these decrees, it does not seem necessary to rule upon this point. Indeed, it is doubtful if the above ruling is necessary in view of the release of the lots of purchasers before the attachment and injunction. But, if necessary, it will be applied in the decree in the case.

The attaching creditors urge that they should not be bound by their consent decree because of their ignorance at the time of consent of the transactions between Stanton, Boyce and Swann in regard to the purchase-money. Conceding that their supplemental bill is sufficient in form to authorize the setting aside of that decree, the reason given does not warrant it. The complaint is not of ignorance of the value of the lot, but of the disposition of the proceeds. They knew of the conveyance by Boyce to Swann long before. They knew of the payments made on the purchase price at the date of the deed; they admit that the payments of which they had knowledge were sufficient to warrant the release of the twenty-four-acre lot. It is incredible that their knowledge that more had been paid, or that Boyce had received part of it, would have caused them to withhold their consent. Their mistake, if any they made, was not of fact, but of law—not of the amounts paid, but of the effect of their release.

In regard to the question of determining the date of notice from registration, if the same shall become

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material in enforcing a decree under this opinion, the same will be declared to take effect from the date the deeds were noted for registration as prescribed by law: Code, secs. 529, 2888. In *Miller v. Estill*, Meigs, 483, it was ruled proper to prove by parol the date of the registration of a deed where the register neglected to state it on his books. And in *Baldwin v. Marshall*, 2 Hum., 118, it was held that the register might correct the registry so as to conform it to the original, and also the date of the same might be proven by parol. When, therefore, there was doubt, as in the case of the bond to Gillespie, of the date of registration, it was proper to prove, either by official certificate of the register or a copy from his note book, or by his deposition, the date when the same was noted for registration, and it would take effect from that date.

On behalf of Gillespie & Co., it is urged they should not be bound by the consent decrees because at the date of their entry three of the four members of the firm were dead. That cannot impair the decree. The rights of the partnership in the litigation survived to the remaining member of the firm; and the power and authority of consenting to the decree were also his. The parties interested in this Gillespie debt were, therefore, bound by this consent, and the decree based thereon.

It is scarcely necessary to say, though exception may demand it, that the attaching creditors have no liens upon that part of the sixty-nine and a half acres laid off in streets and alleys at the time of

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filing their attachment bills. These had been dedicated to the public by Stanton, and could not, therefore, be summarily reclaimed by him, nor seized by his creditors.

The objection of Boyce that proper discrimination between his acts as executor and in his own right, will make a difference in the result of the litigation, is not well taken. Boyce sold as executor; the court decreed he had a right to sell as executor; he conveyed as executor, and covenanted that he had a right so to convey. It goes without saying, therefore, that he had the right to receive the purchase money, and dispose of the same, answerable of course to the legatees, on his administration bond, for the proper disposition thereof.

The case of D. J. Duffy against Stanton and others was heard, together with these consolidated causes, and Duffy was in the decree postponed to the other attaching creditors. Of this joint hearing and postponement his counsel complains in argument, insisting that this cause should have been heard separately, and Duffy given priority over the other attaching creditors in the fund resulting from the sale of the interest of Stanton in the entire sixty-nine and a half acres, because by his bill he had specifically attached the fund resulting from the sale of the twenty-four-acre lot, as the property of Stanton, in the hands of Swann and Boyce, and thus gained a prior specific lien. But on examination of Duffy's bill, it appears that he prayed that his case might be consolidated with the consolidated cause of Boyce

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against Stanton, and also in his bill he only prays for satisfaction out of the fund after the claim of Boyce and the other prior liens and encumbrances have been fully paid off and satisfied. In the view of the case we have taken, the fund in Boyce's hands was a trust fund for the creditors in the consolidated causes, and therefore Duffy can only have any surplus remaining after their claims are satisfied.

A decree will be entered in accord with this opinion, substantially confirming the report of the Referees, and in some material particulars reversing the decree of the chancellor. The costs will be adjudged as recommended by the Referees, and the cause remanded for the purpose of executing the decree as directed.

PETITION TO REHEAR.

Upon petition to rehear, INGERSOLL, Sp. J., said:

Complainant, Boyce, has filed a petition to rehear one branch of this complex, consolidated cause, which, with the answers and his replication and rejoinder, has received careful consideration.

1. The ruling specially and most earnestly complained of is that which results in charging Boyce with that portion of the proceeds of sale of the twenty-four-acre lot to Swann, which came to his hands, and requiring him to credit the same on his purchase-money debt. The ground of the complaint is, that: "The opinion of the court in these causes, rendered at the present term, in effect, reverses and

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ignores the opinion and decree of this court in these causes in 1880;" and this is error, as being in violation of the uniform rule, that "after adjournment, this court has no power to review or rehear its own decisions in a particular case."

The case was this:

Boyce had sold a tract of land to Stanton, retaining a lien for unpaid purchase-money. Stanton's creditors had attached his equitable interest in the whole, and in different parts of the tract. Boyce had filed his bill to enforce his vendor's lien. After consolidation of the cases, a decree of sale had been made, for the satisfaction first, of the vendor's lien, and then of the claims of the attaching creditors. The sale was for a long time delayed at the urgent request of Stanton, and by consent of the creditors, on Stanton's representation that he was negotiating privately a sale of the part of the land for a sum sufficient to pay all the debt, and his promise to them that it should be faithfully applied to their payment. After much delay he effected the sale, and paid part of the proceeds as promised; but some he diverted to other purposes. The residue, amounting to several thousand dollars, Boyce, with knowledge of Stanton's promise aforesaid, and the creditor's reliance thereon, and the consequent delay of sale, had, on the transfer of Stanton, received from Swann, the purchaser, and applied to his own private gain, instead of crediting it upon his vendor's lien, or paying it to the other creditors. By the recent opinion the court held that this sale fund was

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a trust fund, for the uses promised by Stanton; that Stanton was an implied or constructive trustee, bound to apply it as promised; and that Boyce, receiving a portion with knowledge of the facts, was chargeable with it as a trust fund, even though he contracted for it in private speculation; and therefore he must credit the sum received on his vendor's lien. This is the holding said to be "in direct conflict with the former ruling, reversing it without mentioning it."

To establish this, citation is made, not from the former decree, but only of a single sentence, wrested from the midst of a ten-page opinion, and separated from its context and from all the other kindred parts of the opinion. It is as follows: "We are of opinion that notwithstanding the indebtedness of Stanton, the existence of attachment liens, vendor's liens, etc., against him, it was legitimate for Boyce to buy the contracts of Swann, upon such terms as the parties might in good faith agree."

From this isolated excerpt is drawn the conclusion that there was a former ruling or adjudication that the attaching creditors could not call Boyce to account for proceeds of the Swann purchase transferred to him by Stanton. But in the decree of 1880, which is *the* evidence of the conclusion and adjudication of the court in the cause, upon the matters in issue, there is no sentence or expression to this effect, or even looking in this direction. On the contrary, the adjudication is expressly refused in the following terms: "The court is of opinion that there is in the

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record no sufficient pleadings or averments and issues made by appropriate pleadings to authorize the matters and things in relation to the waiver of the vendor's lien, * * * as well as the matters of account ordered by said decree in relation to purchase-money or proceeds of sale of the twenty-four acres of land specified therein as came to the hands of respondent, Boyce, and so much of the chancellor's decree as declares said lien satisfied and orders said account, * * * *is for that reason reversed.* * * * But from the facts developed in the record, the court is satisfied that the matters and things embraced in such parts of the chancellor's decree as are here reversed, are proper and legitimate matters to be enquired into and adjudicated, * * * under a proper state of pleadings and issues made for that purpose, as indicated by the opinion delivered in this cause; these consolidated causes are therefore remanded" for appropriate pleadings and proceedings "to bring said matters properly before the court for adjudication."

Instead of adjudging Boyce not liable for these funds, this was an express reservation of the question, until it should be presented for decision on proper pleadings and issues. And this would seem to be conclusive of this matter of former ruling by the court. But recurring to the opinion, and conceding to it, for the nonce, the same force and effect as to the decree of the court, and considering the single excerpt, relied on by petitioner to show a former ruling adverse to the recent opinion, in connection with other expressions on the same subject, and the

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error of relying on the single sentence of the opinion for the judgment of the court becomes obvious. Judge Turney said: "The chancellor decreed that all the attaching creditors, * * * consented to the sale, * * * upon the faith of having, and with the right to have, the purchase-money paid therefor honestly applied, first to the extinguishment of the vendor's lien, and next, the extinguishment of the other debts. * * We are not prepared, by the facts of the record, to concur with or dissent from the chancellor. * * * There is enough in the record to indicate the probability that Boyce has in his hands, or under his direction, funds belonging to Stanton, and for which Stanton's creditors have a right to demand of him an account. * * * Stanton had procured a postponement of the sales upon the ground that he had effected a sale to Swann, and that the proceeds derived from Swann were to be applied to the debts, etc. The creditors agreed to the postponement on condition that they should be so applied. * * * The record does not show what connection, if any, Boyce had with this arrangement, *and we therefore intimate no opinion as to its effect upon his rights under the transfer from Stanton to him.* The matter may be inquired into under a proper procedure for that purpose in the chancery court."

From these and other expressions in the opinion, it would seem clear that the opinion and decree concur in correctly expressing the determination of the court not to rule upon the validity or effect of Boyce's

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purchase from Stanton of the Swann fund, upon the record as it then stood, because, in the language of the opinion, there was "no pleading authorizing any action of the chancellor upon questions of usury, speculation and fraud;" the causes were therefore remanded and the pleadings filed and proof taken, and the record on which the cause has now been heard and determined. •

But if, as petitioner urges, the court should restrict itself in this matter to the single sentence quoted, and decide the question upon it rather than upon the whole opinion, or upon the decree, it is difficult to see how the result would be changed. The utmost claimed for Boyce upon that quotation is that he could buy from Stanton the Swann contracts "upon such terms as the parties might in good faith agree." Stanton could not "in good faith" sell to Boyce for his own private advantage, because he had promised, on the consideration of delay, to appropriate these proceeds from the Swann contracts to the payment of the debts sued on in these causes. Boyce, having knowledge of this promise, and of the reliance of the creditors thereon for payment of their debts, and occupying toward them the relation of a first mortgagor to a second incumbrancer, could not, in legal "good faith" toward them, engage in a contract by which they should be deprived of these funds, and he gain them for his own profit. Nor was his duty to apply these trust funds coming to his hands to the purposes of the trust, according to Stanton's agreement, in any way affected by the consent decree,

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whereby the creditors released the twenty-four-acre tract from their liens, for they therein make this express reservation: "This release is not to have any reference to the proceeds of the sale of the same, or the rights of any one thereto, or *the liability of any one therefor.*" Equity and good faith require that Boyce hold the remnant of the Swann fund acquired by him with notice of its character, just as Stanton, his assignor, held it in trust for the creditors to whom it was promised: 1 Perry on Trusts, sec. 217.

And it is not material to inquire whether the consideration Boyce paid for it were sufficient and valid. In the section above cited, Mr. Perry states the doctrine declared and recognized in numerous cases, and without conflict, to be: "Even if one pay a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. * * * This rule applies not only to express trusts * * but also to constructive trusts, or those trusts that arise from fraud."

A majority of the court are of opinion that this holding does not conflict with the former opinion and decree of the court, and that the equitable doctrines of trust above stated were properly applied to the transactions of Boyce with the Swann fund, and therefore the recent opinion is adhered to on this point.

Whether under this ruling Boyce is chargeable with the proceeds of twenty-eight or of only fourteen

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bonds is rather difficult of determination. A majority of the court think that he should be charged only with the proceeds of fourteen bonds and such interest as he actually received on all the bonds under his assignment from Stanton; and that the debts and incumbrances paid off with the other fourteen bonds, which, though Boyce had received them from Swann, and taken Plock's receipt for them, had never actually come to his hands, should be treated as satisfied with the funds of Stanton. A decree will, therefore, be made accordingly. This will dispose of the questions made with regard to the Watkins debt and other debts paid out of these fourteen bonds. The R. Inge Smith debt was paid out of the thirty-four bonds, and need not, therefore, be noticed further.

Boyce urges that if held liable as trustee, he should have compensation as such for attorney's fees and expenses out of the fund to the extent of, say \$10,000. Courts of equity often make such allowances, sometimes even when the position of trustee is voluntarily assumed, if the trustee has been diligent and faithful to his trust. But Boyce ignored this trust, denied it, sought to appropriate the funds to his own use, and thus deprive the creditors of them, to whom they had been promised, and to whom in equity they belonged; the trust has been forced upon him by these suits against his continued resistance even to this time, and as a consequence he seems to stand before the court in the attitude of an *executor de son tort*. He has all the liabilities, but none of the

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privileges of a regular trustee: *Williams on Ex'rs*, 255. The funds which he is compelled to account for as trust funds he cannot be allowed to apply to his indemnity for attorney's fees and expenses: *Sharp v. Caldwell*, 7 Hum., 417-18.

A majority of the court are also of opinion that the report of Referees should be modified as to the matter of costs, so that Boyce should be charged with only one-third of the costs of this court instead of one-half, as recommended by the Referees, and that the attaching creditors should pay the other two-thirds; in other particulars the costs will be disposed of as recommended in the Referees' report.

KNOXVILLE IRON COMPANY v. FRANK A. DOBSON.

1. **PLEADINGS AND PRACTICE.** *Evidence* If one party call for a conversation from one of the interlocutors, the opposing party may call for the same conversation from the other interlocutor, so as to have it fully before the jury, and a general objection would be of no avail if, in fact, the testimony of both witnesses is in substantial accord.
2. **SAME.** *General objection to testimony.* A general objection to the admission of testimony, if good at all, goes only to substance, and will be of no avail if the evidence be merely irrelevant or innocuous.
3. **SAME.** *Charge of court. On abstract propositions.* A charge on a particular point, neither required by the pleadings or the facts, is ordinarily a mere abstract proposition for which the court will not reverse, especially if it is the converse of a proposition called for by a position of the party who assigns it as error.

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4. *SAME. Statute prohibiting more than two new trials applies to Supreme Court.* The statute which prohibits the granting of more than two new trials at law necessarily applies to the Supreme Court, which only renders the judgment that the court below should have rendered.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. S. A. ROGERS, J.

ANDREWS & THORNBURGH for Iron Company.

HENDERSON & JOUROLMON for Dobson.

COOPER, J., delivered the opinion of the court.

Action of Dobson against the Iron Company to recover damages for personal injury while in the employment of the company. The verdict and judgment were in favor of Dobson, and the company appealed in error. The Referees recommend a reversal of the judgment. Both parties have excepted to the report so as to open the whole case.

There have been four trials before a jury in the court below, resulting in each instance in a verdict for the plaintiff, and this is the third appeal in error to this court. The first verdict was set aside by the trial court, the record not showing for what cause. Upon the defendant's appeal from the judgment rendered on the second trial, there was a reversal by this court for error of law in the charge of the trial judge. The opinion then delivered is reported in 7 Lea, 367. Upon the second appeal, the judgment below was reversed upon the express

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ground, recited in the entry of this court, that the evidence was not sufficient to sustain the verdict. The present appeal is from the fourth verdict and judgment. After so many trials, all resulting the same way, and three refusals of the trial judge to interfere with the verdict, the error ought to be clear which would justify us in prolonging the litigation. It is to the interest of the parties, as well as to the State, that the strife should terminate.

The main controversy in this case was whether the plaintiff below was, at the time of the injury complained of, an employe of the company or of one Al. Williams, a contractor under the company. Williams had control, under a verbal contract with the company, of several machines for making nails, which were run by power, and with materials furnished by the company. The plaintiff below, then a minor, was engaged at one of these machines, handling and turning, by means of a pair of steel nippers, the sheet of iron from which the nails were clipped by the knives of the machine. While thus employed, the knife burst to pieces, and one of the eyes of the plaintiff was struck by an iron splinter and destroyed. Al. Williams was introduced as a witness by the Iron Company, and was asked, upon his examination in chief, whether he had an interview with the plaintiff's father after the accident, and if so, what was said. The witness answered, in substance, that he did have such an interview on the evening of the accident, and had showed plaintiff's father the condition of the knives and machines, and the father

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had expressed himself satisfied that no one was to blame, etc. In rebuttal, the plaintiff introduced his father, and asked him if he remembered the conversation spoken of by Williams. Thereupon, as the bill of exception says, the question was "objected to by defendant, objection overruled, and exception taken." The witness then testifies that he remembers the conversation, and virtually concedes that he might have said what Williams had stated, after the latter had explained the matter his way. The objection is general, and gives no reason why it is made, nor are we able to see any. The reason assigned in argument is, that the conversation was not a part of the *res gestæ*, but this ignores the fact that the defendant had called for the conversation, and the further fact that the testimony being in accord with that of the defendant's witness could not possibly prejudice the defendant.

The defendant introduced as a witness its president, and upon cross examination the plaintiff, without objection, interrogated him about two conversations he had with the plaintiff's father shortly after the accident. When the plaintiff recalled his father in rebuttal, he asked him to state what conversation he had with the president of the company a few days after the accident. This was, says the record, "objected to by defendant, objection overruled by the court, and exception taken by defendant's counsel." The witness answered, stating the facts substantially as they had been detailed by the president himself. The conversations related to the payment of the plain-

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tiff's doctor's bill, amounting to \$40, which the company refused to pay. The only addition which could be seriously objected to was the statement by the father that if the bill was paid he would never say any thing more about the lawsuit, so far as he was concerned. The objection made at the trial gives no reason why the evidence should be excluded. It is doubtful, as we have heretofore said, whether this form of exception is sufficient to put the court in error. For it is plainly the duty of counsel to take the judgment of the court on the specific ground of objection then made, so that this court can review it. The contrary practice gives the party an opportunity to state one ground in the court below, which may be properly overruled, and to rely upon an entirely different ground here. And we have expressly held, in a criminal case, that a general objection taken in the trial court to a question, or to the admission or rejection of evidence, if good at all, would only go to substance or competency, not form; and would, therefore, be of no avail in this court where the evidence was merely irrelevant, the question leading, or in some respect improper, especially if, in the latter case, the answer be such as to render the question innocuous: *Miller v. State*, 12 Lea, 223. The answer to the question objected to in the case before us was clearly innocuous, because it fully sustained the defendant's own witness in all of its detail of facts, except in the addition quoted. That statement was improperly admitted, and if it had been specially objected to would no doubt have been ex-

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cluded. It was, however, only a proposition as to the father's rights, not as to those of the son, which could not be compromised by the father. The evidence was not competent to contradict the defendant's witness, the only possible ground upon which it was legally admissible, for the contradiction would have been as to irrelevant matter brought out by the plaintiff's own examination of the defendant's witness: *Rocco v. Parczyk*, 9 Lea, 330. But we do not consider it sufficiently important to justify a reversal.

The charge of the trial judge to the jury, as it is embodied in the bill of exceptions, contains this clause: "Defendant insists that if the jury shall find from the proof that plaintiff was an employe of the defendant at the time of the injury, still the defendant is not liable, because the injury was occasioned by the negligence and careless act of a co-employe and fellow-servant of plaintiff. I have already instructed you as to the duties of employers in selecting and employing co-employes and fellow-servants, but I again instruct you, under this position assumed by defendant, that if plaintiff received an injury proximately caused by the negligent acts or conduct of employes in the same department of work, and the defendant, as the master, used ordinary care and diligence in selecting such fellow-servants, and did not know he was reckless and careless, and thereafter kept him in such employment without such knowledge, the plaintiff cannot recover in this action for such injury." The defendant's counsel does not object to this part of the charge, but he does object to a clause

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of the portion of the charge referred to by his Honor when he says: "I have already instructed you as to the duties of employers in selecting fellow-servants," etc. The clause thus excepted to is in strict accord with the language of Judge McFarland, when the case was formerly before us, as reported in 7 Lea, 377. The objection now made is that there was no evidence that the defendant was negligent in employing or retaining in its service any employe with notice or knowledge of his incompetency, and that such evidence, if offered, would have been inadmissible under the declaration. And it is true that the declaration is not based upon the employment or retention of an incompetent servant, nor is there any evidence on the subject. But it is equally clear that from the first trial of this cause down to the present time, the defendant has contended that if the plaintiff was an employe of the defendant, and was injured by a fellow-servant, the defendant would not be liable because he can only be liable in such case if the defendant was negligent in knowingly employing or retaining an incompetent servant by whose fault the injury was occasioned. And the trial judge seems not only to have so charged the law, but to have stated affirmatively that if the master did knowingly employ or retain an incompetent servant, he would be liable. No objection was made to the charge in the court below upon the ground now assumed, nor was any request submitted to his Honor calling his attention to the point now made. And it is obvious that the learned judge has, according to a very prevalent practice, felt it his duty to

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charge upon every position assumed by counsel, stating a case hypothetically, first for one side and then for the other. This practice of the circuit judges has compelled us, in order to terminate litigation, to hold that a general charge without facts cannot do any harm. "Very few verdicts," we have said, "would stand if the vague generalities which trial judges feel it their duty to indulge in, so as to cover every possible view which may have been presented in the argument of counsel, were treated as fatal because there were no facts in evidence to sustain them": *Railroad v. Duffield*, 12 Lea, 63, 74. Without either pleadings or proof, the alternative charge objected to was a mere abstraction, while the direct charge was in accord with and demanded by the position of the defendant.

It is next insisted that the circuit court erred in refusing to grant a new trial upon the defendant's motion, the evidence being insufficient to support the verdict. By the Code, sec. 3122, it is provided that: "Not more than two new trials shall be granted to the same party in an action at law, or upon the trial by jury of an issue of fact in equity." This court has uniformly held that the statute was intended to limit the power of the courts over the findings of fact by the jury upon regular proceedings and a correct charge. If the court in the same case has set aside, upon the motion of the same party, the verdicts of two juries, upon the ground that the evidence is not sufficient to sustain them, the power of the court is at an end to grant another new trial

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to the same party upon the facts or merits: *Trott v. West*, 10 Yer., 499; *East Tennessee, etc., Railroad Company v. Hackney*, 1 Head, 170; *Burton v. Gray*, 10 Lea, 580. The statute does not prevent the granting of new trials for errors committed by the court, or for improper conduct which may vitiate the verdict: *Whitemore v. Haroldson*, 2 Lea, 313; *Curuthers v. Crockett*, 7 Lea, 97. But it has also been held that if a party has already obtained two new trials, it will be error in the trial court, at his instance, to set aside a third verdict against him, unless the record itself shows that the legal ground, which prompted the action of the court on the previous motions, brought it within the exception of the decisions, evidence of the fact *aliunde* being inadmissible: *Turner v. Ross*, 1 Hum., 16; *Ferrell v. Alder*, 2 Swan, 77. In the case before us the record shows one new trial granted by the circuit court to the defendant, the entry of which does not disclose the ground of the court's action. The record further shows one new trial granted to the defendant by this court expressly upon the merits, without disclosing any other legal grounds. In granting this new trial we rendered the judgment which the circuit court should have given. There have been, therefore, two new trials granted to the Knoxville Iron Company in this case upon the merits, and the circuit court could not legally have granted the company another new trial upon the verdict before us. The statute is in terms imperative, and it is only by the construction put upon it by the courts that it has been restricted to

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new trials on the merits. And the decisions are clearly right which make it the duty of the party seeking the benefit of an exception created by judicial construction to show by the record that he is within it.

But it is insisted that the statute does not apply to this court. The language of the statute is general and prohibitory. And if it had in terms been directed to the trial courts, this court, upon appeals in error, only corrects the errors of the trial court, and renders the judgment which that court should have rendered. We cannot reverse a judgment upon the ground that the court below should have granted a new trial upon the facts, when, as we have repeatedly held, it would have been error in that court to have granted the new trial. The statute thus necessarily includes the appellate court.

Affirm the judgment.

DOMESTIC SEWING MACHINE COMPANY v. R. A. JACKSON, S. T. ATKIN, J. W. GAUT and R. F. GAUT.

1. **PRINCIPAL AND SURETY.** *Previous indebtedness.* A failure to disclose to the sureties the previous indebtedness of their principal, when not requested to do so, is no evidence of fraud.
2. **SAME.** *Discharge of surety.* To hold the surety was discharged because of the omission of the creditor to advise him of the previous transactions between the debtor and creditor, in the absence of any

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inquiry on the subject, would establish a rule that would make instruments requiring a surety of little value.

3. *SAME. Liability caused by act of creditor.* If by any act of the creditor the surety's liability is increased beyond what it was at the time he became bound, he will be discharged.
4. *SAME. Concealment. When it is fraudulent.* Concealment or failure to disclose becomes fraudulent only when it is the duty of a party having knowledge of the facts, to disclose them to the other party.
5. *SAME. When it is one's duty to disclose.* All the instances, in which the duty to disclose exists, and in which a concealment is therefore fraudulent, may be reduced to three classes:
 1. Where there is a previous definite fiduciary relation between the parties.
 2. Where it appears one or each of the parties to the contract expressly repose a trust and confidence in the other.
 3. Where the contract or transaction is intrinsically fiduciary, and calls for perfect good faith. A contract of insurance is an example of this class.
6. *SAME. Non-disclosure in insurance cases.* The strict rule in respect to non-disclosures, applied in insurance cases, does not extend to the contracts of suretyship and guaranty.
7. *SAME. Disclosure. Duty when inquiry is made.* If inquired of, the creditor is bound to answer truthfully. But not being asked, he is not forced to disclose any circumstance in connection with the particular transaction in which he is about to engage which will render the position of the surety more hazardous, or to inform him of any matter affecting the general credit of the debtor.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. M. L. HALL, J., presiding by interchange.

JAMES COMFORT and A. S. PROSSER for complainants.

HENDERSON & JOUROLMON and WEBB & MCCLUNG for defendants.

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DEADERICK, C. J., delivered the opinion of the court.

This case was brought to this court from the chancery court at Knoxville, by appeals of S. T. Atkin, J. W. and R. F. Gaut.

The bill was filed in December, 1880, to hold Atkin and J. W. Gaut liable as sureties for certain notes, aggregating some \$700 or \$800, upon which complainant had obtained judgment against defendant, Jackson, as principal and sole obligor.

The bill alleges that prior to October 31, 1876, complainant had been selling defendant, Jackson, on credit, "sewing machines and appurtenances," and on that day said Jackson and said Atkin and J. W. Gaut executed a bond, which is exhibited with the bill, in the sum of \$2,000, binding the obligors to pay complainant all indebtedness that might thereafter accrue against said Jackson for sewing machines and appurtenances bought by him of complainants. The bill sets out the balance due upon purchases made after the execution of said obligation or bond, up to July 12, 1877, after which time no other purchases were made.

The answer admits the sale of machines to defendant, Jackson, before and after October 31, 1876, and that J. W. Gaut and Atkin signed the bond as Jackson's sureties, and they insist that said bond is void because of the fraudulent devices used by complainant in obtaining it. Defendants, Atkin and J. W. Gaut, deny their liability for any part of the indebtedness of Jackson.

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The grounds upon which said Atkin and J. W. Gaut resist liability on their bond, are that Jackson, prior to October 31, 1876, the date of said bond, was clerk in the store of Hodge, Clinton & Co., at Knoxville, and was then selling machines for complainants, and said Jackson fell in debt to complainants about \$1,000: said firm of Hodge, Clinton & Co. were Jackson's guarantors or sureties, and they had failed, and Jackson could not pay. An agent of complainants, after failure to secure the balance due from Jackson, agreed to continue to furnish Jackson machines, upon his executing bond with security, with the design as averred to use the means realized on the new business to pay the prior indebtedness, and to make the sureties on the new sales liable to pay the new debts.

Defendants allege they did not know of the existing indebtedness of Jackson to complainants, upon previous transactions, at the time they signed the bond, and it was a fraud in complainants not to communicate to them the facts in relation thereto; and that all, or nearly all, of the proceeds of the new business were applied to the old indebtedness, leaving all, or nearly all, of the later purchases unpaid. Defendants aver that they had confidence in Jackson's honesty, and supposed he would apply the proceeds of his sales after the execution of the bond to liabilities for which they had become his sureties. It is averred that respondents were ignorant of the misappropriation of proceeds of new purchases, and of the fact of indebtedness of Jackson, and would not have become his

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surety if such fact had not been intentionally and fraudulently concealed from them.

Respondents, in their answer, demanded a jury to try the issues of fact in the cause.

In September, 1877, defendant, Jackson, conveyed to R. L. Gaut, in trust, certain interest in real estate in Knoxville, to secure and indemnify defendants, Atkin and J. W. Gaut, as sureties as aforesaid. R. L. Gaut is, for this reason, made a defendant to the bill, in order that said real estate may be subjected to sale.

A jury was empaneled, a declaration filed by complainant, and pleas filed by defendants. The only plea necessary to be considered, is the second, as it is not contended that the others are maintainable. The declaration is upon the bond, with suitable averments of breaches by Jackson and his sureties. The second plea is, "the defendants say that the said bond was procured by the said complainants from said defendants by fraud, covin and misrepresentation, wherefore, they say that said bond is void in law, and this they are ready to verify."

The issues were submitted to one jury who disagreed, and were discharged. At a subsequent term a trial was had, and the jury returned a verdict for complainants on all the issues, and a new trial being refused, final decree was pronounced in favor of complainants, and defendants, Gauts and Atkin, have appealed.

The Referees recommend a reversal of the decree, and complainants except.

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The whole question turns upon the correctness of the judge's charge to the jury. The second plea was treated by the parties and the court as sufficient to allow proof of facts tending to establish the fraud pleaded.

His Honor charged the jury as follows: "It is insisted that if Potterfield, plaintiffs' agent, at the time of the execution of the bond, knew of Jackson's indebtedness to plaintiffs, previous to that date, and had opportunity to disclose that fact to defendants before they signed the bond, and failed to do so, this would avoid the bond on the ground of fraud."

Upon this subject, the court said: "I charge you that if the evidence shows that Potterfield was interrogated as to this matter, or requested to give information thereon, it would then have been obligatory on him to, have given truthfully all the knowledge he possessed on the subject, and if he failed to do so, or concealed the truth under these circumstances, then the defendants would not be liable on the bond, and this issue should be found for them. But if no information was sought of Potterfield on this matter, then the fact that he did not disclose it, was of itself no act of fraud, and no act of fraud can be inferred from his failure to disclose it without request to do so, although he may have known the fact, and had opportunity to disclose it."

The court also charged the jury that the debtor had the right, in the absence of any contract to the contrary, to direct upon which of two or more debts a payment should be applied. If he does not direct, the creditor would have a right to apply it to others,

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and the application by the creditor to the old debt would not discharge sureties on the new debts.

Two cases in our courts have been cited by defendants in support of the proposition, that the failure by complainant's agent, who took the bond, to inform them of the existing indebtedness of Jackson at that time, was a fraudulent concealment of a fact that he was bound to communicate.

One case is in 4 Cold., 608. That was a case in which the debtor, in failing circumstances, at the instance of his sureties, made a tender, held by the court to be valid, of the full amount due, which was refused by the creditor. The debtor failed and the sureties were discharged, because the creditor wrongfully refused to take the debt when tendered. In the other case, sureties became bound for the faithful discharge of an agent's duty at one depot, and the agent was transferred to another, where different and larger responsibilities were imposed upon him, and this court said it was a material change of duties, and increase of responsibility, for which the sureties were not bound: 2 Lea, 393.

Neither of these cases is analogous to this case. In the latter case it is said, entire good faith is due the surety, and if any fact increasing his responsibility be concealed from a surety, it will operate to release him. That is, if by any act of the creditor his liability is increased beyond what it was at the time he became bound, he will be discharged. In all cases, concealment or failure to disclose, becomes fraudulent only when it is the duty of a party having knowledge of

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the facts to discover them to the other party: 2 Pom. Eq., sec. 902. And this author, in the same section, says: "All the instances in which the duty to disclose exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes:

1. Where there is a previous definite fiduciary relation between the parties.

2. Where it appears one or each of the parties to the contract *expressly* reposes a trust and confidence in the other.

3. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. The contract of insurance is an example of this last class."

But the strict rule in respect to non-disclosure applied in insurance cases, does not extend to contracts of suretyship or guaranty. If enquired of, the creditor is bound to answer fully and truly. But he is not bound voluntarily, without being asked, to disclose any circumstances *unconnected with the particular transaction* in which he is about to engage, which will render the position of the surety more hazardous, or to inform him of any matter affecting the general credit of the debtor: Kerr on Frauds, 122; Brandt on Suretyship, sec. 365; 82 N. Y., 127.

In 12 Lea, 305, the case of *D. C. & J. W. Hubbard v. J. W. Fravell et al.*, is reported. In that case Hubbards filed a bill against Fravell and his creditors, seeking release as sureties of Fravell, on the ground of fraudulent concealment of facts which materially increased the risk of their suretyship. It seems Fravell's creditors had obtained judgments and levied execu-

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tions on his goods, and he obtained the Hubbards to become his surety for sixty per cent. of his indebtedness, and gave his individual notes for the remaining forty per cent., and the levy was released. The fact not communicated to the surety by the creditors, was the execution of the note for forty per cent., no inquiry having been made of them. This court held, Judge Cooper delivering the opinion, that a debtor, in procuring security, acts for himself and not for the creditor, and not having inquired of the creditor, although his indebtedness was larger than he supposed, he was not misled by the creditors; that the transaction was an ordinary one for the adjustment of pressing debt, and there was no ground for imputing misconduct to the creditors, and held the sureties bound.

This case presents the failure to disclose to the sureties the indebtedness of their principal as the evidence of fraud. The other indebtedness of Jackson, although it may make the relation of suretyship more hazardous, is unconnected with the undertaking in the bond. But, as was said in the New York case cited, to hold the surety was discharged because of the omission of the creditor to advise him of the previous transactions between the debtor and creditor, in the absence of any inquiry on the subject, would establish a rule that would make instruments like the one in question of little value. In that case the debtor was largely in arrears with the creditor on sales of sewing machines, and the surety was seeking exoneration on the ground of concealment of the state of accounts between them when he became surety.

Truxall & Dummeyer v. Williams & McCallie.

In this case the machines were sold to Jackson, and defendants, Atkin and J. W. Gaut, bound themselves as sureties, or absolute guarantors, for the payment of the machines sold, and they must be held to the performance of their contract. The application of the proceeds to the old debts was authorized by Jackson, and he had the legal right to so apply them.

The defendants requested the court, on the trial of the issues submitted to jury, to charge several propositions upon the question of fraud, inconsistent with the charge as given by the court. This was refused. We think there was no error in this, as the charge as given by the court was correct.

The result is, that the exceptions to the report of the Referees must be sustained, and the report set aside, and the chancellor's decree affirmed.

TRUXALL & DUMMEYER v. WILLIAMS & MCCALLIE.

LIEN, MECHANIC. *On personal property.* A mechanic employed by an owner of a portable engine, boiler and appurtenances, to take the same down from one place and remove and erect them temporarily upon the land of another, is not entitled to a lien either upon the land or the machinery.

FROM COCKE.

Appeal from the Chancery Court at Newport. H.
C. SMITH, Ch.

Truxall & Dummeyer v. Williams & McCallie.

PHELAN & GOREE for complainants.

W. J. MCSWEEN for defendants.

FREEMAN, J., delivered the opinion of the court.

The question presented in this case is as to a mechanic who is employed by the owner of an engine and boiler and appurtenances, to take the same down from one place, where situated, remove them to the land of a third party, and put the machinery up in good order on that third person's land, the mill machinery (a portable one) being put on said land temporarily, in view of the supply of timber, the owners to have one-half of the lumber sawed.

The claim is for a lien on the machinery put up, and not on the land. In fact the only interest or right in the land of defendants is merely the right for the time, by permission of the owner, to occupy his land with the mill and machinery in order to saw his timber into lumber.

The bill was demurred to, demurrer sustained, which is approved by the Referees, to which complainant excepts.

The mechanics' lien is given by section 2783, new Code, 1981, T. & S., "upon any lot of ground or tract of land upon which a house has been built or repaired, or machinery or fixtures furnished or erected," etc., "when done in pursuance of a special contract with the owner or his agent," etc. By section 2745: "The lien shall include the building, fixture or improvement, as well as the lot of land, and continue for one year," etc.

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This court has repeatedly held that these provisions are to be liberally construed in favor of the protection of the laborer in his wages, and thereby encourage improvements: *Barnes v. Thompson*, 2 Swann, 315; 1 Coldwell R., 541. In the last case it was held that a party who had leased a lot for ten years, and put a house on the same, "was owner" to the extent of his lease, and the term subject to the mechanics' lien.

The section of Code, 2745, above quoted, expressly says the lien shall include the building, *fixture* or improvement, and so it is argued this case is covered by this language. But it is evident this only applies to fixtures referred to in the first section of the act, put on the land by special contract with the owner or his agent. The case from Coldwell's Reports goes entirely on the principle that there must be ownership of some interest in the land, and so the statute seems to require.

But here is no ownership of a term, or any interest in the land whatever, to be subjected to complainant's claim, but only a permission to occupy with portable machinery another's land for the purpose of sawing his timber. The party owning the machinery could remove it at any time he chose. It is not a fixture erected by the owner for the beneficial use of his own land, as contemplated in the first section of the statute. It is only the temporary occupation of a party's land by the personal property of the owner, the property having no permanent connection whatever with his freehold. The only legal

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question is, then, whether a mechanics' lien exists on mere personalty, as such, of another, while being temporarily used on a third party's land, by the permission of the land owner. The statute has not given such a lien, and we are not authorized to say it exists.

The decree must be affirmed, and report of Referees approved, with costs.

P. P. PICKARD, Comptroller, v. W. A. HENDERSON.

JUDGES, SPECIAL. *Salary. Constitutional Law.* The act of 1877, chapter 135, which provides "that hereafter, when by reason of the incompetency, sickness or other cause, any judge or chancellor of the inferior courts shall be unable to hold his courts, and a special judge shall be appointed or elected, said special judge shall receive no compensation from the State, unless in the recommendation or certificate of the regular judge or chancellor for the appointment of such special judge or chancellor, he shall expressly authorize the said judge or chancellor to be paid out of his regular salary," is constitutional.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. S. A. ROGERS, J.

ATTORNEY-GENERAL LEA for Pickard.

A. S. PROSSER for Henderson.

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DEADENICK, C. J., delivered the opinion of the court.

This is a petition for *mandamus* by W. A. Henderson, to compel Pickard, the comptroller, to issue his warrant in his favor for \$144, for twenty-four days' service as special judge of the criminal court of Knox county.

It appears, that at and before the January term, 1885, of said criminal court, the Hon. M. L. Hall, the regularly elected and qualified judge of that court, was unable to hold said term of his court on account of sickness, which fact he certified to the governor. Thereupon Hon. W. A. Henderson was commissioned by the governor to hold said January term of the court, "with all the powers, privileges and emoluments thereunto appertaining by law."

A peremptory *mandamus* was ordered by the judge directing the comptroller, Pickard, to issue a warrant in favor of petitioner for the amount claimed by him, and thereupon said Pickard appealed to this court.

The question presented in this record is, whether there are any emoluments appertaining to such service, by the law, as it existed at the time of the performance of such service.

The comptroller can, under the law, only draw his warrant upon the treasury for such sums as may be found due from the State; and then he is required to specify the statute or authority under which such warrant issued: New Code, sec. 238, sub-sec. 2.

He insists that the act of 1877, chapter 135, prohibits the issuance of any warrant in favor of peti-

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tioner. That act provides as follows: "That hereafter, when by reason of the incompetency, sickness, or other cause, any judge or chancellor of the inferior courts shall be unable to hold his courts, and a special judge shall be appointed or elected, said special judge shall receive no compensation from the State, unless in the recommendation or certificate of the regular judge or chancellor for the appointment of such special judge or chancellor, he shall expressly authorize the said judge or chancellor to be paid out of his regular salary, in which event said special judge or chancellor shall receive such pay as the regular judge or chancellor should have received for the same length of time, to be deducted out of the salary of the regular judge or chancellor: New Code, sec. 4693.

It is argued for the petitioner, that this act is unconstitutional, by reason of its seeking to take from the salary of the regular judge part of his pay, and thus diminish his salary during his term, for the purpose of paying the special judge. The case of *Burch v. Baxter*, 12 Heis., 601, is cited as sustaining this objection. But the act of 1870, under which this case arose, provided imperatively, that the salary of the regular judge, for the time of his disability, should be applied to the payment of the salary of the special judge who supplied his place. And this act was properly held to be unconstitutional because it diminished the salary of the regular judge during his continuance in office.

But the act of 1877 was in force when the office of special judge was accepted by petitioner, and it

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plainly declared that such special judge should receive no compensation from the State unless the regular judge, in his certificate of disability, should expressly authorize the special judge to receive his pay out of the salary due to said regular judge. It makes the payment depend upon the consent of the regular judge. He is not deprived by the act of any part of his salary. But while the State declares she will not pay a special judge, it leaves it optional with the regular judge to authorize such payment or not, out of what is due to him, and this consent to so pay the special judge must be attested by written order of the regular judge. If the certificate contains no such expression of consent, then there can be no pretense that the salary of the regular judge is diminished. And the special judge accepts the office, with the act of 1877 in full force, as the latest expression of the legislative will, that no compensation will be paid by the State for such service.

It is only by virtue of the law that a salary can be claimed for official services. The Legislature may refuse, as they have done in this case, to give any pay out of the State treasury to special judges, unless the regular judge agrees that it may be taken out of his salary. This he may, or may not do. But unless he voluntarily relinquishes a part of his salary, he is entitled to it all. But if he chooses to release a part, we see no reason why he may not do it.

The Legislature, undoubtedly, might make provision for the payment of special judges. But we think they have the undoubted power to refuse to do so,

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if they think proper, and the comptroller can only issue his warrant for the payment of money where such payment is authorized by law.

We are, therefore, of opinion that the comptroller is not authorized by law to issue the warrant, which it is sought in this case to compel him to issue, but on the contrary, we hold the act of 1877 forbids him to do so, and that said act is valid and constitutional. The judgment will be reversed and the petition will be dismissed with costs.

TURNER, J., dissents.

STATE OF TENNESSEE v. CLAIBORNE COLLINS.

1. CRIMINAL LAW. *Preponderance of testimony.* After verdict and refusal of new trial by the trial judge, the presumption of innocence is gone, and in order to a reversal by the Supreme Court, a decided or clear preponderance of testimony against the verdict must appear in the record.
2. SAME. *New trial. Competency of juror.* Upon a motion for a new trial on the ground that a juror had expressed an opinion before he was accepted as a juror, the trial judge having heard the proof, and having better knowledge of the witnesses, has far better means of deciding on the weight of what they deposed to, than the Supreme Court can have.

FROM HANCOCK.

Appeal in error from the Circuit Court of Hancock county. NEWTON HACKER, J.

The State v. Collins.

W. P. GILLENWATERS for Collins.

ATTORNEY-GENERAL LEA for the State.

FREEMAN, J., delivered the opinion of the court.

Defendant is convicted of killing one William J. Edens. He was found guilty of murder in the second degree, and sentenced to fifteen years in the penitentiary, in accordance with the verdict of the jury; and has appealed in error to this court.

It is first urged that the verdict is not sustained by the testimony. The rule in such cases is, that after a verdict, and refusal to grant a new trial by the trial judge, the presumption of innocence made by our law in favor of an accused party is gone, and in order to a reversal by this court, a decided or clear preponderance of testimony against the verdict must appear in the record.

No such preponderance is found in this case. There is some decided conflict between the testimony of the witness for the State, who saw the shooting, and two witnesses on the part of the defense, who were likewise near enough to see the transaction. But one of these witnesses is totally discredited as unworthy of belief; and the other so weakened by the attack made on him, as well to justify the jury in disregarding his testimony on this ground alone. The facts proven as to the location of the wounds on the body of the deceased corroborate the statements of the State's witness.

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The theory of the defense is, that the deceased fired the first shot, and defendant fired immediately in response to this attack. But deceased is not shown to have had a pistol at all, in fact, we think it clear did not have one, while defendant is shown to have had two, and assuredly used them on this occasion. No sign of a mark of a bullet is found on defendant, which would hardly have been the case had deceased fired the first shot deliberately, as is the theory of the witnesses who speak of it, within a few steps of defendant. The witness for the State says that after an altercation between the parties, he had taken deceased by the arm and started off with him; that defendant came up stealthily behind them, it being night, and he heard the click of a pistol being cocked, turned and saw defendant drawing down to shoot deceased, and that he did shoot; deceased turned at once, when he fired again, when deceased sprang towards him, the defendant firing again as deceased sprang at him. The deceased was found to be shot in the thigh for the first shot, and in front, in the abdomen near the navel, and then a shot glanced his neck, which the witness thinks was the last shot. All this is in accord with his theory, while at least one of the shots, that in the neck, from the front, could not be accounted for on the hypothesis of defendant's counsel. After careful review of the facts, we are well satisfied with the verdict found by the jury.

It is next insisted the court erred in not allowing a physician, Dr. Jones, to be examined as an

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expert. There is no reversible error in this, for several reasons. Suffice it to say, the record does not show what was proposed to be proven by this witness—the defense had closed its testimony, the State had introduced and closed its testimony in rebuttal. The court cannot be put in error in the exercise of its discretion, in such a state of the case, without showing the materiality at least of the testimony proposed to be introduced.

An affidavit is tendered on the motion for a new trial, showing that a knife had been found in a field in the direction deceased went after he was shot, which might have inflicted a number of wounds found on defendant after the struggle. There is nothing in this. There could be, and was no dispute about deceased having had a knife. The serious cuts on the person of defendant involved this necessarily, or some other sharp instrument. Affidavits also were tendered tending to show that a juror named Turner had said, in a conversation with one Collins, substantially, that defendant would be hung.

This not very decided expression of opinion is denied by the juror, and he swears he had no bias against the prisoner, or any opinion of the case, when sworn, or at any time, except such as was generated by the testimony heard on the trial. Both parties are shown to have been reputable men. The circuit judge, who was the trier of this question, had better knowledge of the witnesses, with far better means of deciding on the weight of what they deposed to, than we can have. We see nothing in the affidavits

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from which we can say he has reached a wrong conclusion.

Upon the whole case we see no reversible error, and think the verdict, to say the least of it, is the legitimate legal result of the case as presented in the record, and the judgment must be affirmed.

WILLIAM D. WILLIAMS v. JOSEPH A. WILLIAMS *et al.*
AND
KATE D. JONES, next friend, etc., v. DAVID SEVIER
et al.

1. **WILLS.** *Beneficial interest. Claims affecting the operation of a will.* It is a well established rule in equity, that a man shall not take any beneficial interest in a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will.
2. **SAME.** *Claims of executors. Statute of limitations.* The will contained a clause which gave the executors power "to pay, if they see proper, just debts barred by the statute of limitations." This can only apply to claims of third parties against the estate, and not to debts or claims in favor of the executors themselves. This would be to make the executors judges in their own cases.
3. **SAME.** *When and where claims of executors to be filed.* Executors have no right to waive any statute of limitations in their own favor, or either of them, without a most definite purpose expressed by the maker of the will. The representative must retain for his own debt within two years and six months, and this must be manifested, either by settlement in the county court of his administration account, or some other unequivocal act of appropriation.

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4. **SAME.** *Advancements in lifetime of testator. Interest on same.* Interest should be allowed on all advancements of money from the death of testator, where the money value is charged against the legatee in the will.
5. **SAME.** *Property advancements.* As to property advancements the rule is that the property, as it existed at the death of the testator, with the advancements, constitute the fund for division, and the children are entitled to share in the subsequent increase and profits in the proportion in which they were entitled to the *corpus*.
6. **SAME.** *Provision of forfeiture. Executors can not insist on a forfeiture.* Where a will contains a provision of forfeiture of all interest in the estate on the part of one who contests the will, and the will makes no gift over in case of forfeiture, then the executors can not insist on a forfeiture, if waived by the devisees and legatees. This would be to permit them to force a possible benefit on parties, who, having ample opportunity to assert their own rights, have declined to do so.

FROM GREENE.

Appeal from the Chancery Court at Greeneville. H.

C. SMITH, Ch.

A. B. WILSON for complainant, Williams.

JOS. W. SNEED for complainant, Mrs. Jones.

H. H. INGERSOLL for respondents.

FREEMAN, J., delivered the opinion of the court.

Mrs. Catharine D. Williams died in Greene county, May, 1870, possessed of a large estate, both real and personal. She left a will disposing of the entire estate, with the exception of some small bequests, to her three sons, Joseph A., Thomas L. and complainant, William D., and her only daughter, Eliza D. Sneed, who had intermarried with the late Hon. Wil-

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liam H. Sneed, of Knoxville. She appointed Jas. W. Deaderick, the present Chief Justice of this court, and David Sevier, Esq., her executors, who proved the will soon after her death, and entered upon the execution of its trusts. The administration was complicated with many difficulties calculated to delay a final settlement, growing out of litigation by which the property in many ways was sought to be affected. For these reasons, no doubt, a final settlement was delayed until in November, 1879. The original bill was filed in this case by complainant, W. D. Williams.

This bill has two leading objects: First, a construction of the will of Mrs. Williams in the several matters specified; second, to take the settlement of the estate from the control of the executors, and have a settlement of the same in the chancery court, with a general account of its administration. In addition, a claim is presented for \$1,200 for personal services rendered by complainant for the executors in attending to the business of the estate, together with a specific relief, in reference to a tract of land sold by the executors, known as the College Farm, a portion of which was purchased by his wife.

The relief is sought in these matters, based on charges that the executors "have not sought the aid of a court of chancery to construe said will, but have construed it themselves," "and have failed to avail themselves of such evidence as would show the nature of the business or the proper meaning of the will, have given to some provisions a construction not intended by the testatrix, greatly to his prejudice, and

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that he has appealed to them in vain" to give such construction as was evidently, as he thinks, intended.

In addition, it is charged that certain provisions of the will are nugatory and void as against public policy, requiring in substance that the legatees and devisees shall submit to the judgment of the two executors in all matters of construction and discretion in the settlement of the estate, and that if any one of them shall sue them for a construction of the will, or for matters confided to them by the will, such party shall forfeit the interest given to him or her, under the same.

The executors answer, giving an emphatic denial of all charges implicating them in any wrong construction of the will, or wrong conduct in their administration of the estate. They accompany their answer with schedules containing a complete showing of all the business done by them. The clear, business-like and satisfactory showing thus made, the work of David Sevier, who was the active executor in the conduct of the business, is most creditable, and deserves the commendation of this court.

The report of Referee Frizzell has succinctly stated the leading issues between the parties, collating the facts found by the Commission, with specific references to the record where they may be found, thus giving us efficient aid in the investigation of the complex record before us.

We will dispose of the questions presented in the order indicated, or as nearly so as may be found convenient:

First. The question of alleged erroneous construction charged in the bill.

By the fourth clause of the second codicil, of date February 17, 1867, the testatrix provides: "Having purchased at a chancery sale made since the date of my original will, the house and lot of my son, William D. Williams, in front of the court-house in Greeneville, it is my will that the said William D. Williams shall have the privilege of redeeming the same by paying the amount of purchase-money, with interest, to my executors and trustees at any time within twelve months from my death; or if they, within that time, can sell the property for more than the purchase-money and interest, they are to pay the *surplus* to him, and he is not to account for it in any manner. If not redeemed within twelve months, the property will form part of my entire estate, or if sold, the purchase-money paid by me, with interest, will be so considered."

An elaborate argument has been submitted to us, endeavoring to support the view that "purchase-money" in this fourth clause only meant two debts, Sevier's and Gass', which were paid by Mrs. Williams, the purchaser, and not the \$5,025 for which she gave her note at the chancery sale. But on looking at the exceptions filed by complainant, we find nothing that points to this precise question. The question, however, does come into view in support of the contention made in the exceptions filed, and will be considered in the proper connection.

We will take up the exceptions of complainant as

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they stand, and dispose of them: First. Because complainant is charged with the amount of the old note of \$1,781.21, the proof in the case showing that the amount of this note was meant by Alexander Williams to be an advancement or gift to complainant, and advancements, with two exceptions specially made, are not to be charged.

This exception presents as its sole question the point as to whether the complainant shall be charged with the note referred to as an advancement or not, and puts the objection on the ground that it was given to him by his father, Alexander Williams, and the will excludes such advancements in express terms, except two instances, one to Mrs. Sneed, the other to complainant.

But the proof shows that this note was sued on by Mrs. C. D. Williams, attachment levied on the land referred to in clause four of codicil quoted above, sold November 9, 1866, for this and the debts of Sevier and Gass, and note of Mrs. Williams for \$5,025, given for the purchase price, and then the land disposed of by said clause, or its proceeds. Mrs. Williams was the sole legatee of her husband and his executrix, and as such beneficial owner of this note. Complainant attempts to show that this judgment was only a means to cover up his property from judgments sought against him at the time, and was never intended to be enforced. But the decided weight of the proof is against this contention. The fact that Mrs. Williams retained this land, into which this judgment entered, and disposed of it and proceeds by

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will, requiring it to be redeemed by complainant by paying purchase-money with interest, or if sold for more than this, then complainant to have the surplus—if not redeemed, the property or its proceeds to go into her general estate, would be conclusive on complainant on this question. The testimony of Sevier, who was her confidential agent for many years before and up to her death, corroborates this view. We deem it well sustained by the weight of the whole record. If this sum was not recognized as a debt, it would have been natural to have said so in a will, and easy to have said that the Sevier and Gass debts were to be reimbursed to her estate, but not the debt on her son.

It is argued, too, that she gave complainant an order on Sevier for \$3,000, part of the money for which the land was afterwards sold to Galbraith & Ingersoll, and thus showed her recognition of his right to the proceeds of the property. But it is clearly shown no such purpose existed, but the contrary. She required a receipt to be taken from complainant for this sum, showing that the amount was received, "not in payment or part payment of any claim or demand I may have against her, but as an advancement or loan by her to enable me to make a start in business, and I bind myself to account for the same hereafter when required to do so."

We need not discuss the position taken in argument, that the judgment in favor of Mrs. Williams is valid. It is unimportant in the view of the case we have taken. The principle, now well settled, as

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stated by Chief Justice Shaw, in *Hyde v. Baldwin*, 17 Pickering R., 303, 308, as the established rule in equity, "that a man shall not take any beneficial interest in a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent, the full effect and operation of every part of the will," is conclusive of the claim made by him in this case. The will treats this debt as part of her estate, or the property purchased in part with the judgment, and disposes of it. The claim of the complainant is directly in the face of this, and insists she was disposing of property which was his, charged only with the small debts of Sevier and Gass. See numerous cases cited in support of this rule by Pomeroy, Equity J., vol. 1, p. 515, note 1.

The next exception is, because complainant is held to be the principal in the note for \$1,590.58, and testatrix only surety, the proof showing, as claimed, that complainant was the beneficiary in said note only to the extent of \$290.89. The only distinct proof as to this sustains the decree of the chancellor.

The Referees hold W. D. Williams was principal on this note, his mother security, and charge him with this sum, but allow him to show such sums as were used for his mother in taking the account. The facts are substantially as stated by complainant, that in 1858 he had borrowed from Sneed \$1,000, and given his note for it, but that it was to be used, and was used, for the benefit of his mother, except perhaps \$290, or thereabouts. That afterwards he,

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Mr. Sneed, and his mother met at Knoxville, in January, 1867, when this note was given, which is as follows:

We, or either of us, promise to pay W. H. Sneed \$1,598.58, with interest from December 1, 1866. Value received. January 26, 1867.

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He claims this note was given in a settlement had at this meeting with Sneed, and included two other notes of complainant for \$100 each, and perhaps some other matters. That he objected to giving his note at the time, as he claimed to have used but a small part of the \$1,000 for himself, and had no access then to his papers, but it was suggested that all this could be adjusted between him and his mother, whereupon he signed the note, and gave him a statement of the settlement now shown in the record.

We think the Referees have reached the proper conclusion. It is conceded by Williams that he borrowed the money, the \$1,000; the other notes included were his own. He claims the greater part of the \$1,000 was used for his mother, and being allowed to show this, is all he can ask.

The next exception is, because certain sales of parts of what are known as the "college farm," a sale made for partition, are reported to be ratified. These sales were made to Joseph A. and Thomas L. Williams, two of the devisees. The objection is that they were but provisional, and in parol, and it is claimed in argument, the property shown to be worth more than was bid for it by purchasers. We think the sale was fair, and no inadequacy of price shown

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at the time of sale. The executors had ample power by the will to make the sale, and in their answer affirm it. We see no cause to interfere with their judgment from the proof in this record.

The fourth exception, as to the old note and judgment on it being void, has been already disposed of.

The fifth exception is: "Because the claims of David Sevier, one of the executors, against the estate, of \$726.85, \$2,462, \$884.18 and \$2,000, as shown in the statement of the executor's account, are allowed, he having shown no retainer for these debts by settlement or otherwise, within two years and six months, nor indeed in ten years. For this reason the statute of limitations, it is insisted, bars these claims.

The Referees report in favor of allowing these claims, as they say "under the peculiar circumstances of the case, and especially under the power conferred upon the executors in the sixth clause of codicil No. 2, "giving them full power to settle all the business of the estate by compromise or arbitration, to release any debt or parts of debts, to take property in payment whenever they think it best, to dispose of the same, to pay, if they see proper, just *debts barred* by the statute of limitations."

We see nothing in these provisions to excuse the executors themselves from the obligations imposed by law as to debts due to themselves or either one of them. It is probable the clause referring to pay debts barred by statute of limitations could only apply to the general statutes of limitations, and not to the statute of two years and six months, requiring all

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claims to be presented to the representatives within that period—a statute to have operation entirely after her death. Be this as it may, the provision can only be held to apply to the claims of third parties against the estate, and not to debts or claims in favor of the executors themselves. This would be to make them judges in their own cases. In the case of an entry-taker, whose duty it was to make entries for appropriation of vacant lands, it was correctly said by Judge Wright, delivering the opinion of this court, in *Egnew v. Cochrane*, 2 Head, 333, that he “could not make an entry in his own name before himself, because it is against public policy, and void upon common law principles.” And so it is said by Blackstone, “that if a statute gives a man power to try *all* causes that may arise in his manor of Dale, yet, if a cause should arise in which he, himself, is party, the act is *construed* not to extend to that, because it is unreasonable that any man should determine his own quarrel.” We could not, in view of these well-settled principles, as well as common justice and propriety, construe this clause as embracing the right of the executors to waive the bar of a statute of limitations in their own favor, without a most definite and unmistakable purpose expressed by the maker of the will. No such purpose is seen in the language quoted. We, therefore, hold the executors had no power to waive any statute of limitations in their own favor, or either of them, in this case. That the representative must retain for his own debt within two years and six months, and this must be mani-

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fested, either by settlement in county court of his administration account, or in some other unequivocal act of appropriation, has been the settled rule in this State for many years: *Byrn v. Fleming*, 3 Head, 662; *Chestnut v. McBride*, 1 Heis., 394; *Shields v. Alsop*, 5 Lea, 508. This exception to the report must be sustained.

Exception sixth is: "Because compensation is allowed to the executors for services, when it is alleged they have unreasonably delayed the settlement of the estate."

The fact is that the delay is explained and met by the fact of repeated litigations that would have prevented a complete settlement of the estate, if attempted, together with the complication of the business. Under the enlarged discretion given the executors, together with the express provision that they should be liberally compensated, found in the will, nothing but a gross breach of duty would cut off compensation for such services as have been rendered. We see no evidence of this; on the contrary, perfect good faith, and more than ordinary care in the transaction of the business confided to them. This exception must be overruled.

We think the report of the Referees is correct in reversing the decree of the chancellor, dismissing so much of the answer of the executors, as was made a cross-bill. It was proper to file this in order to get possession of the land purchased by parol by complainant or his wife, which he was in possession of, and also to bring in the heirs or devisees of Mrs.

Sneed, which is all that is contained in said cross-bill. As to the bill of Mrs. Jones, next friend of her children, while strictly the proper practice would have been to apply under the facts to the chancery court, to be made parties to the bills already pending to settle the estate, instead of filing an original bill, as has been done; yet, inasmuch as they were necessary parties to that proceeding, and had not been so made, and were only so made by amendment after the bill had been filed, which has been consolidated with this case, we will allow it to be treated as equivalent to such petition, and not dismiss it, but allow them to remain as parties, and cost be taxed in final result on this view.

Exception 8 is because the report recommends the confirmation of the sale of the "college farm" to Joseph A. and Thos. L. Williams, and rescission of the one to wife of complainant. The sale being in parol, the executors having ample power to make it, having affirmed it as above, and having been perfectly fair, as we think. the report is correct. The disaffirmance is proper as to complainant's wife, the purchase-money never having been paid, and no ability to pay. The sale having been disaffirmed, the usual consequences follow of account for rents during occupation, to be met by taxes paid, if any, and betterments as far as land enhanced in value, if any. No one could interfere to prevent executors confirming sale, unless fraud or collusion was shown, and none can be made out in this case.

The exceptions of Mrs. Jones and children are next

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to be considered. The first is disposed of as to right of executors to affirm and disaffirm sale of "college farm" tract of land. The second has nothing in it, since the other question is determined.

The third exception is, because the report recommends that interest should be allowed on advancements from death of testator.

This is correct as to all money advancements, or property advanced in the lifetime of the testator, with the money value charged against the legatee in the will. See 3 Yer., 122; *Johnson v. Johnson*, 13 Lea. As to property advancements, the rule is given in Judge Cooper's note to the case in 3 Yerger, approved in *McNairy v. McNairy*, Nashville, December, 1874, that the property, as it existed at the death of the testator, with the advancements, constitute the fund for division, and the children are entitled to share in the subsequent increase and profits in the proportion in which they were entitled to the *corpus*. These rules will serve to guide in the final settlement of this case.

The other exception is as to debts due David Sevier, barred by statutes of two and a half and seven years, and has been already disposed of.

Two questions only are raised by the exceptions of respondents, the executors and Joseph and Thomas L. Williams. The executors except because it is recommended that interest should be charged on assets from the time realized.

Interest on assets is a matter within the sound legal discretion of a court of equity: *Turney v. Williams*, 7 Yer., 213; 3 Heis., 637; 9 Heis., 821. The

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grounds on which he is charged are such as those where he uses the money himself, or by long or improper delay in settlement, the use of the money may be inferred: 7 Yer., 214. Or negligence in laying out the money for the estate, or keeping the same an unreasonable time when no need exists to meet expected demands, or some misfeasance in its management by which it is imperilled. See cases cited, 1 Meigs' Dig., by Milliken, p. 80, 71, sub-sec. 2.

We have held there has been no unreasonable delay in the settlement in this case; that it was caused by circumstances over which the executors had no control. The assets, as far as we can see, have been realized as promptly as possible, and paid out to meet the liabilities of the estate, or to legatees.

On careful examination of the schedules showing collection and payments, it is seen the assets were paid out about as fast as received, probably not more retained in their hands at the time of filing complainant's bill than enough to compensate for services and expenses of settlement; at any rate there is no evidence of any misuse of the funds, or that they have been imperilled in any way. We do not think the executors, making so full and fair a showing of their accounts, should be charged with interest on assets, except any surplus that may be found in their hands at the time of filing the bill for an account, if any such can be shown, and from that period, or unless it can be shown, which is not done in this record, they have made interest or used the funds themselves.

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The other and last exception presents the question, made in the answer of the executors, that complainant has incurred the forfeiture imposed by the terms of the will, by bringing his suit for a construction of the will, and wrongfully bringing in question the construction of the same made by the executors, under the broad power to construe it found in the codicil, a part of the will of testatrix.

The defense is made alone in the answer of the executors, but is not made in the answer of Thomas L. or Joseph A. Williams, or any other party.

The first question is, whether the executors can insist on this forfeiture, standing alone as trustees, having no interest whatever in the property, when the other devisees and legatees have waived whatever rights they might have had under the will to enforce the forfeiture, by failure to insist upon it in their pleading, or urge the enforcement of the forfeiture in any way, except by joining the executors in excepting to the report of the Referees on this ground.

The language of the particular clause imposing the restraint on her children is, "should any of my children seek to contest my will, or to disturb my said executors and trustees, by suits or otherwise, in the lawful exercise of their authority, then such child shall thereby forfeit any claim, legal or equitable, to any part of my estate. It is seen from this language that there is no gift over in case of forfeiture thus incurred, nor is it made part of any general residuary disposition. We think the failure of the other legatees and devisees to insist upon the forfeiture sug-

gested in the will is a waiver on their part of any right which they might have had to have claimed it. This being so, we see no principle on which the executors, who, so far as this question is concerned, are mere naked trustees with no beneficial interest whatever to be affected by enforcement of the forfeiture, or the opposite, can possibly exercise the right to enforce it in favor of and for the benefit of the real parties interested, who themselves have failed and refused to do so. This would be to permit them to force a possible benefit on parties, who, having ample opportunity to assert their own rights, have declined to do so. A case very closely analogous to this, would be of a conveyance in trust of property to pay a number of debts of the conveyor, of which there might be fraudulent or fictitious debts, which, under the conveyance, would share the fund. We have held that the *bona fide* beneficiary creditors might make the question, and on proof have such fictitious debts eliminated from the trust, based on their increased interest in the fund by doing so.

It could hardly be pretended, however, that the *bona fide* creditors refusing to do this, and submitting to being deprived of the benefit, could have it forced upon them by the trustee, who was merely the agent for the execution of the trusts of the instrument, with no beneficial interest to be served or injured. No difference in principle is seen between the case put and the case now in hand.

We, therefore, conclude the trustees cannot raise this question on these facts, and the beneficiaries have

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not done so, and so their exception cannot be sustained.

This disposes, we believe, of all the questions presented by the exceptions filed. A decree will be drawn in accord with this opinion. The costs of this court will be paid, one-half out of the fund in the hands of the executors, the other by complainant, and of the court below in the same proportion. Future costs to be adjudged by the chancellor.

The case will be remanded for the account in accord with this opinion.

GEORGE & CHAPMAN v. EAST TENNESSEE COAL COMPANY.

1. *CONTRACTS. Sufficiency of consideration.* A contract to furnish plaintiff the trade of miners and workmen is sufficiently supported by the consideration that defendant shall receive eight per cent. on all such sales.
2. *SAME. Validity of.* Such a contract is not in restraint of trade, nor immoral nor contrary to law, and is therefore valid.
3. *SAME. Agreement not to carry on business.* A contract not to carry on one's business any where is void, but a contract not to carry it on in a particular place, or within certain limits, is valid.
4. *SAME. Damages.* If the contract was made and violated without excuse, plaintiff would be entitled to some damages.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. S. A. ROGERS, J.

George & Chapman v. Coal Company.

JOHN W. GREENE for George & Chapman.

LUCKEY & YOE for Coal Company.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiffs sued the defendant in the circuit court of Knox county for breach of contract. Plaintiffs were merchants, and defendants had miners and workmen employed. The contract, as averred in plaintiffs' declaration, was, that defendants should furnish plaintiffs the trade of their miners and workmen, and in consideration therefor defendants should receive eight per cent. on sales to said miners and workmen, and either party might terminate the contract on giving six months' notice. Plaintiffs aver readiness and willingness to comply, and that both parties performed their part until March 1, 1883, when defendants opened a store of their own, and abandoned the contract without giving notice, by reason whereof plaintiffs were deprived of large profits, etc., to their damage, etc.

A second count, substantially like the first, sets out the manner by which they were to keep accounts and settle.

The defendants demurred because :

First. The contract was void for uncertainty.

Second. It was *nudum pactum*.

Third. There was no consideration.

Fourth. Damages too remote and uncertain.

Fifth. Contract is against public policy.

The demurrer was sustained, with leave to amend.

Plaintiffs filed an amended declaration averring a

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contract to furnish goods, etc., and condition that either party might terminate it by six months' notice, also averring performance and readiness to perform by plaintiffs, and breach, without notice, by defendants.

In a second count plaintiffs set out the facts that defendants were mining coal, having a large number of employes, and having a contract with said miners and workmen to receive, in part payment of their wages, goods, wares, and merchandise and provisions, contracted with plaintiffs for the exclusive supply from plaintiffs' store for such supplies, which plaintiffs were always ready and willing to furnish, in consideration of which defendants were to receive eight per cent. on all sales to said employes, with liberty to either party to rescind the contract on six months' notice.

The plaintiffs then aver that defendants withdrew without giving notice, cutting off a large trade with said miners and employes for six months, to their damage, etc.

Defendants again demurred, and the demurrer was sustained, suit dismissed, and plaintiffs filed the record for writ of error. The causes of demurrer are: First. Because plaintiffs do not aver that they were able or willing to perform their part of the contract. But in the first count they do aver that they have always stood ready and willing to comply with their part of said contract, and that the same was performed by both parties up to March 1, 1883. Second and third causes are that the contract sued on is *nudum pactum*; and void for uncertainty. The consideration is to furnish goods and discount the bills eight per cent.,

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and is a sufficient consideration to support defendant's promise. The terms of the contract are set out, and are sufficiently explicit.

The third and fourth causes are that the contract is against public policy, and the damages claimed too remote and uncertain. The court sustained the demurrer, and dismissed the bill, and the Referees recommend an affirmance of the decree, and plaintiffs except.

If the contract is prohibited by law, if it be immoral, or contrary to public policy, it cannot be enforced. A contract not to carry on one's trade anywhere is void. But a contract not to carry it on in a particular place, or within certain limits is valid: 2 Parsons on Con., 748. In Note Z, citing numerous cases, showing progressive decisions from very early English cases to comparatively modern ones in that country and in this, the doctrine first held in the English cases is much qualified, and is as stated in the text. The same note cites the case of *Gale v. Reed*, 8 East, 80, very similar in its main features to this case. There A. & B. agreed to give C. two shillings on every hundred weight of cordage they should make, on the recommendation of C., for any of his friends and connections, C. binding himself not to carry on the business of a rope-maker. This was held to be a legal contract. We see nothing in this contract contrary to public policy. It is not in restraint of trade, nor immoral, nor contrary to law. Being a contract which the parties might make without violation of law, the demurrer to the decla-

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rations was improperly sustained. The plaintiffs, if the contract was made, and has been violated without excuse, would be entitled to some damages.

The report of Referees will be set aside, the judgment reversed, and cause remanded for further proceedings.

A. G. SMITH v. WALTER S. GREAVES.

1. CONVEYANCE. *Description of.* In a deed of conveyance it is sufficient to identify the land with reasonable certainty, and this is all that is required.
2. CONTRACT. *Fraud.* It is solely at the option of the party upon whom a fraud is practiced, whether he will be bound by the agreement or not.
3. SAME. *Avoidance of. Notice of intention.* If one is determined to avoid a contract because of fraud, he must give notice of such determination to the other party within a reasonable time after its discovery.
4. SAME. *Conditions of. Laches.* Where an instrument, which does not contain the original intentions of the parties on account of fraud or mistake, is acquiesced in for a period of eight years, with a full knowledge of the existence of such fraud or mistake, the parties are estopped by laches from any attempt to avoid it.

FROM SCOTT.

Appeal from the Chancery Court at Huntsville. D.
K. YOUNG, J.

JEROME TEMPLETON for complainant.

HENDERSON & JOUROLMON for defendant.

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COOKE, J., delivered the opinion of the court.

On November 18, 1872, the complainant and one Joseph F. Davis jointly executed a written instrument, the stipulations of which, necessary to be stated, are as follows: "I, the said Joseph F. Davis, for the consideration of one dollar and the agreements hereinafter mentioned, hereby bargain, sell and convey unto A. G. Smith, his heirs and assigns, all the mineral, coal, iron ore, fire and potter clay, marble, building stone, and other mineral, and all rock and petroleum oil and salines, and all timber suitable for lumber, upon or under the farm or tract of land in the county of Scott, in the said State of Tennessee, bounded and described as follows: All the following described land on the waters of Wolf creek, in two tracts, and described, the first tract being fully described in a deed from the heirs of M. P. Davis, deceased; the second also described in a deed from the aforesaid heirs, including the land on which the said Joseph F. Davis now lives; an exception is made of twenty-five acres where his house stands, including the house, and lying south of the same, containing in the whole two hundred acres of land." Said Smith to have "the exclusive right to enter upon said land at any time hereafter and search for coal, iron ore, and all other minerals, marble and building stone, oils and salines, and when found, to remove the same from said land, together with all rights and privileges incident to the mining, securing and manufacturing said coal, iron ore, clay and other minerals, oils and salines,

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including the right of ingress and egress; Smith to have the use of timber for the construction of buildings, roads, etc., and for use in mining, and the right to erect all necessary buildings, etc., and to have the right to abandon said lands and mining at any time, and remove all his buildings and fixtures from said land; said Smith to pay said Davis ten cents for each ton of 2240 pounds of screened coal, iron ore, or other minerals mined and removed from said land, and the price or rent for rocks or petroleum oil and salines, marble and stone, to be one-twentieth part of the net proceeds; the payment of rent per ton on coal, iron ore and other minerals, clays, oils and salines mined and removed, to be made quarterly."

Said agreement was attested by two subscribing witnesses, and duly registered on November 21, 1872.

Davis and his wife, on March 9, 1880, executed two leases, each for one-half the same land, to one Layton S. Young, for mining purposes, etc., for the term of ten years, the terms of which, so far as payments were concerned, were about the same as in the instrument held by Smith; and on the same day Young executed a lease of the same land, and upon the same terms, to the respondent, Greaves, who entered upon the land and commenced mining operations, a coal vein having previously been opened upon it by Smith soon after the date of his contract. And this bill was filed by Smith on March 23, 1880, alleging that he was the owner of said mineral interests in said land under his conveyance above set forth, and that Greaves, with full knowledge of his rights, and in

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violation of the same, had procured said lease, and entered upon the same, and was mining for coal, committing waste, etc., and seeking to enjoin him from any further operations upon said land, and to have said lease from Young removed as a cloud upon his title, and to be let into the possession under his contract, etc.

Respondent answered and denied that complainant was the owner of the mineral interests in said land, or that he had any knowledge of complainant's claim when he took his lease, and alleges that complainant's contract was forged, and obtained from Davis by fraud; that Davis was entitled to a homestead in the land, and his wife had not joined in the conveyance to Smith, and pleads the statute of limitations of seven years in bar of complainant's right to recover.

On March 29, 1881, respondent filed a cross-bill, by leave of the court, against both Smith and Davis, alleging that Smith's claim was founded upon the agreement of November 18, 1872; that said instrument was in its general form a mineral lease, though called an agreement, and signed by both parties, yet according to its strict meaning it was an absolute deed, and is so treated in the original bill; that it was never so intended by the parties, and had never been claimed by Smith to be any thing but a lease until the filing of his bill; that said instrument does not contain the agreement of the parties, which, it is averred, was that Smith contracted for a mineral lease, and would commence work in five years from that date, and failing to do so, the lease was to be for-

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feited; that nothing was said about timber; that Smith prepared the instrument, filling up a printed blank which he had for that purpose; that Davis, being illiterate and unable to read writing, and having confidence in Smith, signed the same, supposing it contained the proper stipulations; that he took his lease from Davis supposing the agreement with Smith had become void by lapse of time and the failure of Smith to comply with its conditions; that he is advised that he, as the lessee of Davis, is entitled to have said instrument reformed and declared void. He also avers that said instrument, a copy of which is exhibited and made a part of his cross-bill, is void because of the vagueness and uncertainty of the description of the land mentioned therein; that the heirs of M. P. Davis, deceased, never made a deed of any sort to said Joseph F. Davis for said land; that Smith had abandoned said contract before the date of the lease from Davis to Young; that Davis had remained in possession of said land during all the time from the date of Smith's agreement, and occupied the same as a homestead, and held adverse possession of the same; that said lease to Smith was for no specific term, and he was therefore a tenant-at-will of Davis, and seeks to have the same declared fraudulent and void, and removed as a cloud upon *his* title, and if this cannot be done, that it be reformed so as to conform to the contract.

Davis made no answer or other defense to this cross-bill, which was demurred to by Smith upon the ground mainly that there was no such privity or rela-

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tionship between the complainant in the cross-bill and Smith as to entitle him to the relief sought, and that Davis alone had the right to complain of the alleged frauds and mistakes charged in said cross-bill.

The chancellor sustained the demurrer and dismissed the cross-bill.

Proof was taken, and upon the hearing the chancellor granted the relief as prayed for in the original bill. The Referees have reported that the action of the chancellor in dismissing the cross-bill was correct; that the description of the land in the agreement between complainant, Smith, and Davis, was sufficient. They further report that the instrument executed between Smith and Davis does not contain the real contract between them, and was fraudulent, and although Davis is not making any complaint, or seeking any relief, and may be estopped by his acquiescence, yet Smith should be repelled, and his bill dismissed on account of the fraud committed by him upon Davis, and for that reason his bill should be dismissed. They also report that said instrument is a lease at will, and has been terminated by Davis leasing the same interests to Young, and also that Smith had abandoned said contract, and his bill should be dismissed.

Both parties have excepted, and the exceptions open up the whole case.

The description in Smith's conveyance is sufficient. The land was held by Davis by two deeds, lies in one body, containing two hundred acres, on Wolf creek, in Scott county, Tennessee, being described as the same land upon which said Davis now lives;

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both the answer and the cross-bill show and aver it to be all the land owned upon Wolf creek, or in Scott county, by said Davis; and although no deed had been executed to him for the same by the heirs of William P. Davis, as recited in the instrument, yet without this the description is sufficient to identify the land with reasonable certainty, and this is all that is required: 10 Yer., 147; 1 Cold., 267; 2 Tenn. Ch., 23; 1 Head, 606; 2 Hum., 409; and *Turley v. Taylor*, decided at the present term of this court.

In regard to the execution of the instrument in question between Smith and Davis, the proof, we think, shows the following state of facts: The original contract or agreement between Smith and Davis was for a lease of the interests conveyed, and a printed form was filled up containing the identical terms of the instrument in question, with the exception that, as is stated by some of the witnesses, it was to continue for ninety-nine years, and according to some of them, work was to be begun under it in five years from its date, and according to others, in five years after the completion of the Cincinnati railroad. These terms were in the printed portion of said instrument. After it had been thus filled up, said Davis objected that in taking out coal, etc., they might undermine his house and fields, and wanted twenty-five acres, including the same, excepted. There being not room to conveniently interline this alteration, this paper was torn up, and Smith took another blank, which did not contain in the printed part the provisions as to the length of time the same was to continue, nor

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the time in which work was to be commenced; this, he states, was purely by accident, and there is no reason to doubt this statement.

The blank was filled up in the written part in the precise words of the other, with the addition of the exception of Davis' house and twenty-five acres from its provisions. Davis, although he could not read writing, could read print, is a man of middle age and ordinary intelligence, and both the witnesses to the instrument, as well as the complainant, testify that after it was filled up, the whole instrument was read over to him twice, and two of the witnesses state it was twice carefully and plainly read over to him when the parties signed it, and it was witnessed as above stated. Davis, whose deposition was taken, says he does not remember whether it was read over to him or not. The instrument was immediately registered, and, as before stated, Smith, by his agents, afterwards opened a vein of coal upon the land, and took out a considerable amount of coal, which remained at the place where taken out. Davis continued to reside upon the land, and used and cultivated it for farming purposes, etc., but never made any complaint or expressed any dissatisfaction with the terms of the contract, or attempted in any manner to avoid it. Smith, who resided in Kentucky, got into some trouble, and was convicted of a criminal offense in Indiana, and sentenced to the penitentiary of that State. While he was thus confined, Greaves approached Davis, and solicited him to execute a lease to him of the mineral interests in said land, which Davis

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declined to do, telling him that Smith already had a mineral lease upon it. Greaves then went to Young, and they obtained a copy of said instrument from the register's office, and again approached Davis, through Young, who was a relation of Davis, and told him that Smith's contract was of no account, and induced him thus to execute the leases to Young, which was for the benefit of Greaves, Davis distinctly telling them he would not take any responsibility on account of Smith's contract, and they must take the leases to Young upon their own responsibility and at their own risk, and which they agreed to do. Both Davis and Smith, in speaking of the instrument in question, called it, or spoke of it, as a lease, and while we are satisfied the original intention was that it should be a lease, the amount of the consideration or royalty to be paid for it was the main inducement, and not the stipulations as to the precise time when the work was to commence or the time it was to continue. Davis never repudiated the contract, which is on its face a conveyance of the mineral interests, etc., but expressly recognized it as in existence when he was approached by Greaves and Young for the purpose of inducing him to execute a lease of the same interests to Greaves, or to Young for him. They had full knowledge of the existence of said instrument or conveyance, and inspected its terms before taking these leases from Davis, and expressly agreed to take all the risk and responsibility as against said conveyance, Davis expressly declining to take any, or become actor in regard to it. Said instrument, in the

form in which he executed it, had been read to him twice; it had been upon the register's books all the time from its execution, and some work had been done under it. He had acquiesced in it as it was executed for about eight years, and still refused to take any action in regard to it, although it did not contain the terms of the original agreement, in the particulars as stated. Under these circumstances, is Greaves entitled to avail himself of any advantage, take any benefit, or obtain any relief on account of the fraud alleged to have been perpetrated by Smith upon Davis, or of a mistake as between them? We think not.

It is solely at the option of the party upon whom a fraud is practiced, whether he will be bound by the agreement or not. If he determine to avoid a contract because of the fraud, he must give notice of such determination to the other party within a reasonable time after its discovery: Story on Contracts, 497; 12 Heis., 292; Kerr on Fraud, 48.

But if it were conceded that Greaves, who took his lease with full knowledge of Smith, could avail himself of any advantage by reason of the alleged fraud perpetrated by Smith upon Davis, he certainly could not occupy any better position than Davis could himself, who, under the circumstances, would be estopped by his laches and long acquiescence from setting it up. True, he says, he did not know of the terms of the contract, but as the proof shows, it was twice read to him, and was promptly registered in the county of his residence for so long a time, he would

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be held as affected with actual knowledge of it. There is nothing in the position as to either homestead or the statute of limitations. As Davis has the title to the soil, and the right of possession for all the purposes for which the homestead was created, and the proof shows he did not hold possession in hostility to the rights of Smith under his contract, but recognized it up to the time of executing the lease to Young, just before the filing of the original bill in this cause—under the view we have taken—no question of abandonment on part of Smith can arise.

His conveyance must stand. The action of the chancellor, both in dismissing the cross-bill on demurrer and granting relief on the original bill, will be affirmed with costs, and the report of the Referees modified accordingly.

RHINEHART, BALLARD & CO. v. I. C. MURRAY *et al.*

·CHANCERY PLEADINGS AND PRACTICE. *Sale of land to pay debts of decedent. Surplus.* Where land is sold to pay debts of decedent upon exhaustion of personalty, and a surplus is realized, it may be impounded and applied to the payment of a judgment against deceased in favor of a creditor who was not a party to the proceedings for the sale of the land.

FROM HAMBLIN.

Appeal from the Chancery Court at Morristown.
H. C. SMITH, Ch.

Rhinehart, Ballard & Co. v. Murray.

J. C. HODGES for complainants.

J. P. EVANS and LUCKEY & YOE for defendants.

DEADERICK, C. J., delivered the opinion of the court.

This bill was filed to impound a fund in the chancery court at Rutledge, the proceeds of a sale of land. The land had descended to the heirs of one J. P. Kirkham, and they and his administrators were made defendants to a bill of one Noe, who had obtained judgment against Kirkham in his lifetime, and issued execution thereon, which was returned *nulla bona*.

The chancellor ordered an account, which showed the exhaustion of the personal estate, and a debt due complainant of several hundred dollars. Thereupon a sale of the land was ordered, which brought more than the amount of the debt. This bill is filed to have the surplus remaining applied to the satisfaction of complainant's judgment against the administrators of said Kirkham, deceased, and W. H. and T. H. Taylor.

The bill makes the defendants in the judgment, the said Taylors, and said Kirkham's heirs at law, defendants. The heirs resist the relief sought on several grounds. They impeach the validity of the judgment, and maintain that, even if they had a valid judgment, the complainants' could not maintain their bill, because they might and should have prosecuted their claim under the bill of Noe, which was a proceeding to sell the land by a creditor under the act of 1827: Old Code, sec. 2267.

The complainants in this case brought suit in the circuit court at Rutledge, against W. H. and T. H.

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Taylor and the said J. P. Kirkham, deceased, shortly before the death of Kirkham.

The sheriff returned the summons executed as to all the defendants. A declaration was filed, and before pleading thereto, Kirkham died. Thereupon a *scire facias* was issued to revive the suit against Murray and Taylor, his administrators. This was executed, and although no formal order of revivor appears in the record, it does appear that they demurred to the declaration, and the demurrer being overruled, put in pleas of *nil debit* and payment, and that they appeared thenceforward in a number of orders by the court, as named defendants in said cause, and judgment was rendered on confession.

It is insisted by the heirs at law, that the notes on which judgment was rendered were forgeries; that their ancestor was not summoned, as returned by the sheriff, and that they may make all the defenses as heirs, as this proceeding is, in legal effect, to reach lands descended to them.

Taylor, one of the defendants in the suit at law, had filed his bill against complainants, the plaintiffs in said suit, enjoining the further prosecution thereof, and prayed a perpetual injunction on the ground of fraud. The injunction was granted upon condition that the complainant would submit to judgment at law upon the notes sued on.

They all confessed judgment in open court, having in pleas of *nil debit* and payment at the time, and the injunction was finally dissolved and the bill dismissed.

The return of the officer cannot be collaterally im-

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peached, nor can the defendants in this proceeding have the benefit of a plea of *non est factum*, especially as they had ample opportunity to plead it in the suit at law, and the answer which sets it up is not sworn to. Even if the *fiat* did not require a confession of judgment by all the defendants, the court had jurisdiction to take it and render such judgment, and the record shows all confessed, and is conclusive of that fact.

This is not a proceeding to sell land, but to take and apply to complainant's judgment a fund in the chancery court already adjudged, in a regular proceeding in that court, liable to pay decedent's debts.

The complainant in this bill sought to have it heard with the bill of Noe, and the last named cause was made evidence in this case. It fully appears in the Noe case, that the land was liable for decedent's debts because of the exhaustion of the personalty, and it had already been sold for this purpose, when this bill was filed, and the land was thus passed to another owner, and the funds arising from its sale were personalty expressly so made by the sale for payment of debts.

The chancellor held that the complainants were entitled to the fund, and the Referees approve the decree and we concur with them, and confirm the report and affirm the decree.

Pyett v. Hatfield.

PYETT v. HATFIELD.

CHANCERY PLEADINGS AND PRACTICE. *Judgment obtained by fraud.* Where appellant failed to prosecute his appeal by having record filed, and the appellee files record and has an affirmance of judgment without notice to appellant or his attorney, the appellant may, by bill, attack the judgment for fraud upon the allegation that appellee, "by his fraud, prevented the proper officer from sending the record to the Supreme Court in due and proper time; that he, though taking advantage of his own wrong and fraud, and falsely representing to the Supreme Court, when complainant's attorney was not present, and without notice, that complainant had failed and refused to bring up the record, and had abandoned his appeal, had procured fraudulently the judgment to be affirmed."

FROM SCOTT.

Appeal from the Chancery Court at Huntsville. D.
K. YOUNG, J.

L. A. GRATZ for complainant.

HENDERSON & JOUROLMON for defendant.

FREEMAN, J., delivered the opinion of the court.

This bill charges that in 1880, a judgment was rendered by the circuit court of Scott county, against Pyett, for \$31.20; that an appeal was prayed and granted to the Supreme Court, which was perfected by proper appeal bond.

It is then shown in detail, that the clerk of the circuit court failed for several terms to send a transcript of the record to the clerk of the Supreme Court, giving the excuses for such failure. It is charged ex-

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plicitly, however, that the clerk at all times promised to send the transcript, and had, for a reason given, employed one Parker to make it out.

It is then charged, "that after thus being delayed by the neglect of duty by the clerk, and after the above promise, that he learned in November, 1882, to his surprise, that Hatfield had a transcript of said record from the newly elected clerk of Scott county, and had by his attorney, presented the same to the Supreme Court, at a time when, under the rules and practice of said court, no motions were in order, and by falsely and fraudulently representing to said court that complainant had abandoned his appeal, and that he had refused and failed to bring up the record, moved the court, under the statute, to affirm said judgment, and the court, giving faith and credit to these false and fraudulent representations, on — day of —, 1882, accordingly affirmed said judgment."

It is then charged, "that Hatfield, by his fraud, prevented the proper officer from sending the record to the Snpreme Court, in due and proper time; that he, through taking advantage of his wrong and fraud, and falsely representing to the Supreme Court when complainant's attorney was not present, and without notice, that complainant had failed and refused to bring up the record and had abandoned his appeal, had procured fraudulently the judgment to be affirmed."

Do these facts, as charged, make out a case of obtention of a judgment by acts of fraud, authorizing the same to be enjoined?

The procurement of the record from the clerk is

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certainly no wrong, as Hatfield had the right to do so, on payment of cost to the clerk, nor is it shown it was the copy prepared to be sent up in pursuance of the appeal by the former clerk. The inference is, it was not the promised transcript, but one made out for Hatfield by the newly elected clerk.

It is not charged that Hatfield knew any thing of the causes of failure by the clerk to forward the record, or of his promise to do so.

On the statement of the bill, the sole fraud, that is, giving facts on which to base it, is that when Hatfield presented this record to the Supreme Court, and asked an affirmance, he represented "that the complainant had failed and refused to bring up the record, and had abandoned his appeal."

It has been settled, since 1854, when the case of *Furber v. Carter & Yergin*, 2 Sneed, 304, that if the appellant fails to prosecute his appeal, by filing the record in this court at the term to which the appeal is prayed, his opponent may take steps to remove the suspension of his judgment, produced by the appeal in error, by himself filing a transcript of the record, and moving for an affirmance of the judgment on said record so filed. But it was definitely ruled in that case, "that if the record was brought up by the appellee, and an affirmance moved for at any time after the term of the Supreme Court to which the record ought to have been certified, notice of his intention to do so ought to be given to the appellant or his attorney." This being so, it follows that the charge that the party falsely and fraudulently represented to

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the Supreme Court that the other had failed and refused to bring up the record, and had abandoned his appeal, and thereupon took judgment of affirmance without any notice, is a charge of a material fact vitally affecting the right of complainant, on proof of which he would be entitled to be relieved of the judgment so obtained. If he had been notified, he might have shown that the delay was the wrong of the clerk and not his, and thus met the suggestion of abandonment of his appeal.

The report is disapproved, and the chancellor's decree reversed, and case remanded.

LAYMANCCE v. LAYMANCCE *et al.*

APPEAL. *Failure to file record. Abandonment.* If the failure to file a record at the succeeding term of the Supreme Court after appeal was prayed, is due to the delay of the clerk, and there is no evidence of abandonment of the appeal, the appellee is not entitled to an affirmance.

FROM MORGAN.

Appeal from the Chancery Court at Wartburg. D.
K. YOUNG, J.

S. R. VANCE for complainant.

SEVIER & WALKER for defendants.

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FREEMAN, J., delivered the opinion of the court.

A motion is made in this case to affirm the decree below, for failure on the part of appellant to file the record at succeeding term, after the appeal was prayed and granted, and on the assumption that the appellant has failed to prosecute or has abandoned the appeal.

While it is settled an officer may file the record for affirmance, if the appellant fails or refuses to prosecute the appeal prayed, we do not think this is the case contemplated. It is clear the failure to file the record was the delay of the clerk and master of the chancery court, and there is not only no evidence of abandonment of the appeal, but, on the contrary, an evident purpose to prosecute, the delay in getting the record to this court being caused by the neglect of the clerk of the court below. There has not, it is true, been energetic action on the part of the appellant to get the record forwarded, but the principle of the cases on this question is not to enforce a forfeiture of the right to appeal, but to enable the party having a judgment or decree, to prevent its indefinite suspension by an appellant, who refuses himself, or is culpably negligent, in not having the record filed. We do not find such culpable negligence in this case. The motion is disallowed.

The case, on the merits, is substantially this: Complainant was the wife, and now the widow, of John W. Laymance, she being about thirty-five years of age, he upwards of seventy. The old man being in feeble health, in what proved to be his last illness, on November 28, 1880, executed a will, in which he devised

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to respondents, his children by a former marriage, all his real estate, worth about \$4,000; his personal property, except \$250 in money, and some other property of not much value, he bequeathed also to his children; the \$250 and other excepted articles being given to his widow. At the same date he executed deeds of conveyance of the lands to his children, in accord with the will, reserving, however, a life estate to himself. He died in January, after this. The wife joined in the execution of the deeds, and her privy examination, as now appears, in the record, is regular and formal.

She urges the invalidity of the deeds on the ground that she was ignorant and illiterate, and did not clearly understand her rights; and to use the language of her bill, she signed and acknowledged them against her own will and inclination, and in the presence of and at the special solicitation and direction of her husband, who had by fraud and undue influence been procured to sign the deeds himself. She then adds, "her own signature was obtained in the same manner, that is, by fraud and undue influence, and she signed them in ignorance of her rights."

The respondents deny the fraud and undue influence as charged, and the case was heard on this issue by the chancellor, who dismissed complainant's bill, from which there is an appeal to this court.

It would be useless to go into the details of the testimony in this case. It suffices to say, that the chancellor's decree is abundantly sustained. The testimony of complainant herself would only make out the case of signing a deed at request of her husband, and

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a reluctance to do so, but yielded because of a desire to do as he wished. But as to any fear or undue influence prompting her act, she says very frankly, that she could not have been compelled by fear, as she would have died before she would have signed it, except to please the old man.

The testimony of defendants is overwhelming that she did sign the deed with a full understanding of what she was doing, and without the slightest constraint from any one.

The chancellor's decree is undoubtedly correct, and must be affirmed, with costs.

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GEOGRE W. ROSS v. JOHN G. SCOTT and A. B.
RUSSELL.

1. CHANCERY PLEADINGS AND PRACTICE. *Mesne profits. Rents.* A bill filed to recover the possession of land, and remove a cloud from the title of the complainant by reason of the claim of the opposing party, and, as incident to the relief sought, an account for mesne profits, mining coal and cutting timber, is a bill of pure equitable cognizance under our decisions, and all that the complainant can claim on the account is reasonable rent and just compensation for the coal mined and wood cut.
2. PLEADINGS AND PRACTICE. *Action for damages.* The courts of law, trammelled by their forms of action and the principles on which they were supposed to rest, such as title in replevin and conversion in trover, have found it difficult to adopt a rule which would lead to uniformity in the recovery of damages for the same wrong, but show a growing inclination to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is to give just compensation for the injury, which has always been the rule of equity.

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3. **SAME.** *Damages.* The weight of authority now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance, and not wilful, the damages will be confined to the value of the property before the trespass was committed.
4. **SAME.** *Same. Rents and improvements.* When, therefore, the defendant in good faith, under an honest belief of title, mined coal on land only valuable for the coal, and cut timber for the purpose of erecting houses on the land and making props for the mine, he was held liable for the value of the coal *in situ*, and for the timber as trees, and for the rent of the houses erected, but allowed the permanent enhancement of the land by reason of the improvements.
5. **SAME.** *Forged deed.* The fact that there is a forged paper as a link in the defendant's title, containing on its face marks of suspicion, is a circumstance to be looked to in determining the question of good faith, but not conclusive upon him as matter of law.

FROM MORGAN.

Appeal from the Chancery Court at Wartburg. D.
K. YOUNG, J.

A. S. PROSSER for complainant.

LUCKEY & YOE, WEBB & MCCLUNG and SEVIER
& WALKER for defendants.

COOPER, J., delivered the opinion of the court.

On May 10, 1882, the defendant, Russell, claiming the land in controversy under a written instrument of sale purporting to have been executed by Patsey J. Galbraith, on March 2, 1871, undertook to sell the land to the defendant, Scott, by assigning to him the instrument of sale, and making him a deed to the land. The defendant, Scott, caused the assignment, with the instrument attached, and the deed to be duly registered about a month after he received them. On

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August 4, 1882, the bill in this cause was filed by the complainant as the rightful owner of the land, under conveyances which are set out, alleging that the supposed contract of sale, purporting to be executed by Patsey J. Galbraith, was a forged instrument, containing on its face sufficient evidence to a man of ordinary business capacity that it was not genuine, averring that the defendant, Scott, under this forged title, was outting timber and mining coal on the land, and asking that he be enjoined from thus committing waste. The bill prayed that it be decreed that the complainant's title to the land was valid and perfect; that defendant, Scott's, title be declared void, and a cloud upon complainant's title; that complainant have a writ of possession for any part of the land in possession of the defendants, or any person under them, and that the necessary orders be made for the stating of an account, showing the value of the timber cut and coal mined, and that a decree be rendered for the same.

The defendant, Scott, answered the bill, insisting upon the genuineness of the instrument sought to be impeached, but denying, in the event the fact should be otherwise, all charges of collusion with his co-defendant, and claiming that he bought the land in good faith, and paid the price, under the belief that he was acquiring a good title. The depositions of Russell and of several of his relations and neighbors, were taken to establish the genuineness of the instrument under which he claimed title, and that he had been in possession of the land for more than seven

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years. But the entire proof clearly showed that the instrument was a forgery. The defendant, Scott, was not implicated in the wrong, and he himself testifies that he bought the land in good faith, without any knowledge of the forgery at the time, or at any time, until alleged in the bill and proved. He ceased to contest the complainant's title as soon as the testimony of Russell and his friends satisfied him that the proof of forgery could not be successfully met. On July 4, 1883, a decree was rendered, virtually conceded to have been by consent, declaring that the complainant's title to the land in controversy was superior to that of the defendant, Scott, that the claim of the latter rests as a cloud upon that title, and settling the rights of the parties accordingly. The cause is then referred to the master to hear proof and state an account, and report certain facts upon which a final decree may be rendered, reserving all questions on the basis of the account and measure of relief. Previously, after the coming in of the answer, the chancellor had, on September 5, 1882, dissolved the injunction granted when the bill was filed, upon the defendant, Scott, entering into bond with good security in the penal sum of \$5,000, conditioned to indemnify and save harmless the complainant from any loss or damage that might accrue, or be decreed to him by reason of the dissolution, and of the defendant mining coal and cutting timber upon the land described in the bill. The decree of July 4, 1883, contained the following provision, which, it is clear, could only have been made with the consent

of the complainant: "In the meantime the defendant, Scott, is not prohibited from mining and removing coal from said land as heretofore, the same to be accounted for under and upon the basis and settlement of this account, and his bond filed upon dissolution of the injunction."

The chancellor, upon the coming in of the master's report, held that the proper basis of the account for mining was the value of the coal in bed, unmined and existing as realty, and that this value, under the proof, was the usual royalty paid by lessees for the right of mining, which he found to be one cent for each bushel of coal mined. He also held that the defendant, Scott, was not entitled to any thing for betterments put on the land, nor the complainant to damages for the timber cut, because the same was used in building houses on the land and as props in mining. The exceptions filed by both parties to the master's report were disallowed, and a decree was rendered against Scott for the amount of royalty found, with interest, and the costs of the cause, including the costs of surveys made by the complainant. From so much of this decree as fixed the basis of damages to be allowed him for coal mined and timber cut, the complainant alone appealed.

The Referees are of opinion that the defendant, Scott, is to be regarded as a wilful trespasser, or, at least, as one who has negligently failed to investigate his title, the foundation of which as to him is a paper bearing upon its face such marks of forgery as to put a prudent man upon inquiry, and when nearly

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all of the coal was mined and timber cut after the bill was filed charging a forgery. They hold that, under the circumstances, the defendant should be charged with the value of the coal at the mouth of the mine, or what it was sold for at that place, without any deduction for the cost of digging it out, or for other expenses incurred in mining or transporting the coal to the mouth of the mine. Even if the defendant could be regarded as having converted the coal under a *bona fide* belief of right, the Referees report that he should be charged with the value of the coal at the mouth of the mine, or what it brought at that point, and should be only allowed the cost of transporting it to that point, without any deduction for severing it from the land. To charge him with "royalty" only is, in their view, to allow him the profit in the business, or to place him, although a wrong-doer, on the same footing as one who mines under contract with the owner. For the same reason they charge the defendant with the highest value shown by the proof of the timber cut from the land, namely the value of the lumber and props into which the timber was converted. They concur with the chancellor in holding that defendant was entitled to nothing for betterments, but, curiously enough, say that he should be charged with rents received by defendant from the lease of the houses erected by him with a part of the timber cut. The defendant, Scott, excepts.

The chancellor merely found that the complainant had the better title. The Referees do not say that

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the defendant was a wilful wrong-doer, or that he was implicated in the matter of the forgery. Their idea is that he is a wilful trespasser because he negligently failed to investigate his title, one link of which was a paper bearing upon its face such marks of forgery as to put a prudent man upon enquiry, and because most of the mining was done after the bill was filed. The original instrument in question has been sent up with the record. When looked at now, or at the time the Referees had it before them, in the light of the proof of its forgery, it might well look suspicious, not because the dates and signatures are written in different ink from that used in the body of the instrument, for that might happen in any case where the instrument was drafted at one place and signed at another, but because there is a very rough erasure, so rough as to have made a hole in the paper, of the figures constituting the date of the year as first written, and because there is a striking resemblance in the handwriting of the signatures of the bargainor and the attesting witnesses. That these *indicia* exist is a circumstance, and a strong circumstance, to be looked to in determining the question of the defendant's good faith. But the existence of the *indicia* is not conclusive. The question is not one of negligence or oversight, but of good faith. The proof is that the forged instrument bore the ostensible date of March 2, 1871, a date more than ten years preceding the sale to Scott, that Russell claimed that he had been in actual possession of the land for a sufficient length of time to perfect his title by the

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statute of limitations, and that he himself positively swore to the fact and the genuineness of the paper in a deposition taken in this cause, and produced several witnesses who undertook to sustain him upon the point of possession. The record shows further, that defendant had the assignment to him of the supposed contract, with the instrument itself, and his deed duly and promptly registered; that he paid the purchase price of the land, and expended about five thousand dollars in opening the mines, and making the necessary improvements to work them; and that he has worked the mines as the owner of the land. He swears, as we have seen, that he had nothing to do with the forgery, nor any knowledge of it until alleged in the bill. He ceased to litigate as soon as the forgery was clearly proved, and a decree, which is conceded to have been by consent, was at once entered in favor of the complainant, declaring the superiority of his title and ordering an account. We think, with the chancellor, that the defendant must be treated as having entered upon the land in good faith, and exercised acts of ownership under an honest claim of right. He continued to work the mine after the bill was filed upon the same claim of right until the forgery was established, and afterwards under the consent decree. His liability throughout must be considered as resting upon substantially the same basis.

The courts of law, trammelled by their forms of action and the principles upon which they were supposed to rest, such as title in replevin and conversion in trover, have found it very difficult to formulate a

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rule which would lead to uniformity in the recovery of damages for the same wrong. The result depended upon the form of action adopted and the time of bringing suit, and might be very different, although the real cause of injury was the same. We find a strong example in the case of the *Woodenware Company v. United States*, 106 U. S., 432. There a trespasser cut timber from the public lands to the value of sixty dollars, which would have been the limit of the recovery in trover against the wrong-doer at the place. But he carried the timber to a distant market at a heavy expense, and sold it to an innocent purchaser for \$850. In an action brought by the United States against the purchaser, in the nature of an action of trover, it was held by the Supreme Court that the recovery should be the value of the timber at the time of sale. The result may be logical, but the inequality between the damages and the recovery is too great to be satisfactory. And neither the English nor the State authorities have gone quite so far. The tendency of the courts, the text-writers all agree, is to look less to form and more to the substantial object of all rights of action, which is to redress the injury by just compensation: 3 Suth. on Dam., 376, 488; 2 Sedg. on Dam., 484; Add. on Torts, sec. 539; 7 Cent. L. J., 301. "A careful examination of the authorities," says the Supreme Court of Nevada, in a recent case, "has convinced us that there is a growing inclination among all courts, where it can be done, to apply the only safe and just rule in actions of damages, whether *ex contractu* or *ex*

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delicto, and that is to give the injured party as near compensation as the imperfection of human tribunals will permit": *Waters v. Stevenson*, 13 Nev., 157. "In civil actions," says the Supreme Court of Michigan, during the present year, "the amount of recovery does not depend upon the form of the action in a case like the present (where logs were cut by mistake from the lands of another and hauled into a creek several miles from the land), but, whether it be upon contract or in tort, the proper measure of damages, except in cases where punitive damages are allowed, is just indemnity to the party injured for the loss, which is the natural, reasonable and proximate cause or result of the wrongful act complained of": *Ayres v. Hubbard*, 32 Alb. L. J., 217. And such was the rule of damages applied by this court in *Ensley v. Mayor, etc., of Nashville*, 2 Baxt., 144, where timber was cut by a wilful trespasser. The measure of damages was held to be the value of the trees as they stood upon the land, and the injury to the land by their removal. The weight of authority, both of English and American, now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance and not wilful, the damages will be confined to the value of the property before the trespass was committed, or, to use the language of the English courts, "at the same rate as if the property taken had been purchased *in situ* by the defendant at the fair market value of the district": *Wood v. Morewood*, 3 Q. B., 440; *Jegon v. Vivian*, L. R., 6 Ch., 742; *Hilton v. Woods*, L. R., 4 Eq.,

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432; *In re United Merthyr Collieries Company*, L. R., 15 Eq., 46; *Livingston v. Raward's Coal Company*, 42 L. T., (N. S.), 334; *Goller v. Felt*, 30 Cal., 481; *Forsyth v. Wells*, 41 Pa. St., 291; *Ward v. Carson River Wood Company*, 13 Nev., 44; *Weymouth v. Northwestern Railroad Company*, 17 Wis., 550; *Footo v. Merrill*, 54 N. H., 490. *Longfellow v. Quimby*, 33 Me., 457; *Stockbridge Iron Company v. Cove, Iron Works*, 102 Mass., 80; *Railway Company v. Hutchins*, 32 Ohio St., 571.

The court of chancery is not hampered by forms, and possesses all the power and means to do exact justice as near as is possible. It never enforces forfeitures nor gives punitive damages. The fundamental rule of equity is to afford just compensation to its suitors. The bill before us is, under our decisions, one of pure equitable cognizance: *Almony v. Hicks*, 3 Head, 39. It seeks to remove the defendant's paper title as a cloud upon the complainant's legal title to the land in controversy, and, as the necessary consequences of the decree, to recover possession of the land in controversy, and to have an account for mesne profits and waste. All that the complainant can claim on the account is just compensation for the coal mined and wood cut. That just compensation, under the foregoing principles of law and the rules of a court of equity, is the value of the coal before it was mined, and of the wood before it was cut, with such damages, if any, as may be occasioned by the impairment of the value of the land by reason of the removal, or mode of removal, from the soil.

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The proof does not show, nor do we understand it to be seriously claimed, that the value of the land has been impaired by the removal, either of the coal or wood. The only claim and contest are over the value of the coal and timber. The chancellor allowed the highest royalty which the owner of the land could obtain for the privilege of taking out the coal. That royalty is the price of the coal *in situ* before it is severed. It is no objection to this rule that the defendant is allowed the profit of mining. For, obviously, there could be no sale of coal *in situ* if there were no profit in mining it. And even in the case of a wilful trespasser on land, all that the real owner can recover in the way of mesne profits is reasonable rent, not a rack-rent, but a rent which leaves a margin for profit. And the reason is that otherwise there could be no renting at all. The chancellor's decree as to the value of the coal with which the defendant should be charged was therefore correct.

In the absence of special damage to the land, which is not shown or claimed, the complainant would be entitled to the value of the timber cut as it stood in the tree, and to the rent of the houses erected on the land with that timber. On the other hand, the defendant would be entitled to the permanent enhancement of the value of the land by reason of the permanent improvements made by him as they existed at the time of the consent decree (when the defendant began to mine virtually under contract), to the extent at least of the rent and waste. The master reported the value of the trees cut at \$120, and the value of

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the defendant's improvements at \$1,250, of which \$1,100 were spent in erecting houses. The Referees find that the latter expenditure was made in erecting eleven houses, seven of which, made of logs, were upon complainant's lands. The value of the trees as above being \$120, the Referees find the value of small timber used as props to be \$131.25, and the amount of rent \$168, these three sums amounting to \$419.25. The most moderate estimate of the enhancement of the value of the land by the improvements of the defendant would certainly exceed this sum. And, besides, the small timber used as props in the mine were no doubt paid for by the increased royalty on the additional coal gotten out by their use, and the charge of rent has been carried beyond the date of the agreed decree.

The report of the Referees will be set aside, and the decree of the chancellor affirmed. The complainant will pay the costs of this court.

GEORGE M. BURDETT and WIFE v. J. W. NORWOOD *et al.*

1. PARTITION OF LAND. *Commissioners. Duty.* The duty of commissioners appointed to make a partition is to make partition of the land in kind exactly equal in value if possible, and if this cannot be done, then as nearly equal as they can.
2. SAME. *Same. Same.* The commissioners in partition, under the Code, section 3283, which authorizes them, if exact partition cannot be

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made without material injury to the parties, or some one of them, to charge the larger shares with the sums necessary to equalize the shares, cannot compel an unwilling party to pay money, or part with any portion of his land for money unless the exigency of the statute is shown to exist by their report of the facts.

3. *SAME. Same. Same. Report.* The report of commissioners in partition is in the nature of a special verdict, and must state facts, not mere conclusions, so that the court may judge of the sufficiency of the reasons assigned for the action.
4. *SAME. Same.* A family settlement by which the realty of infants is changed into money, cannot be made in a suit for the partition of land, through the commissioners appointed to make partition.

FROM LOUDON.

Appeal from the Chancery Court at Loudon. W.
B. STALEY, Ch.

LUCKEY & YOE for defendants.

LOGAN and CHAMBERS & PRITCHARD for defendants.

COOPER, J., delivered the opinion of the court.

W. A. Lenoir died intestate, leaving a large landed estate in Loudon county, and as his sole heirs a daughter, the complainant, Eliza H. Burdett, wife of complainant, George M. Burdett, and the three minor children of a deceased daughter, namely, the defendants, Louisa L. Norwood, Avery Norwood, and Eliza J. Norwood, for whom their father, the defendant, J. W. Norwood, is general guardian. This bill was filed by Burdett and wife against the minors for partition of the land. The chancellor appointed commissioners to make partition, the shares of the minors, all of whom are under ten years of age, to be set apart to them jointly, not in severalty. Out of the 2,839½

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acres to be divided, the commissioners allotted to Burdett and wife 1,778 acres at a valuation of \$36,000, and allotted to the infants $1,061\frac{7}{8}$ acres at a valuation of \$12,000, and charged the share of Burdett and wife with \$12,000 in favor of the infants to equalize the shares. The defendants, by their guardian, excepted to the report of the commissioners:

1. Because they were entitled to one-half of the land in value, whereas the commissioners, without sufficient reason, had given them only one-fourth.

2. Because the commissioners, instead of allotting to the infants their one-half of the land in kind, in effect, at a price fixed by them, sold the interest of the infants in 1,778 acres of the land without sufficient reason.

The chancellor disallowed the exceptions, and confirmed the report, making partition accordingly, and the infants appealed.

The report of the commissioners shows that they allotted to Eliza H. Burdett land as follows:

1. Original Lenoir tract,.....	1,100 acres.	{	at \$35,000.
2. Clowney tract.....	415 "		
3. Dunn tract.....	188 "		
4. Vineyard tract.....	75 "	{	at 1,000.
	<hr/> 1,778		<hr/> \$36,000.

And allotted to the infants:

1. Powell tract.....	$347\frac{3}{4}$ acres.	at \$ 7,000.
2. Shinpaugh tract.....	$713\frac{7}{8}$ "	at 5,000.
	<hr/> $1,061\frac{7}{8}$	<hr/> \$12,000.

The entire valuation of the land amounts to \$48,000, of which the infants get one-fourth in kind.

In their report the commissioners say: "In making the above described partition, we were satisfied that

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exact partition could not be made without material injury to all the parties interested, especially the minor heirs, and that the said partition as made by us was as nearly equal as we could make it; and that it would be better to give the difference in money, secured by a lien on real estate, to the minor heirs, than an excess in land. Hence, we put the land into these shapes, and assign them to the parties for the following reasons: We assigned the home tract to Eliza H. Burdett for the reason that this tract could not be divided, nor could any part thereof be taken off and attached to another portion without material injury to the value of the farm, as the railroad runs through it, cutting off on one side almost all the running water; and also for the reason that the proportion of rolling land and river bottom is such that they should not be separated, and that this undivided tract, requiring careful cultivation to prevent deterioration in value, would be much better assigned to Eliza Burdett than to the minor heirs. We assigned the Dunn and Vineyard tracts to Eliza H. Burdett, for the reason that it was not a tract that could be rented out so as to yield any revenue, and could only be of value in this partition when controlled in connection with the home tract."

The provisions of the Code regulating the subject of partition contains this section: "If the commissioners are satisfied that exact partition cannot be made without material injury to the parties, or some one of them, they may make the partition as nearly equal as they can, and charge the larger shares with

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the sums necessary to equalize all the shares, and report the facts": Code, sec. 3283. The duty of the commissioners is to make partition of the land in kind exactly equal in value if possible, and if this cannot be done without injury to one or more of the parties, then "as nearly equal as they can." They cannot make an unwilling tenant in common pay money to equalize the shares unless the exigency of the statute exists, nor can they compel a tenant to part with his land for money except in a like exigency. Their report is in the nature of a special verdict, and must state the facts, not mere conclusions, so that the court may judge of the sufficiency of the reasons assigned: *Hardin v. Cogswell*, 5 Heis., 549.

When we look to the report of the commissioners, we find that the reason assigned for the allotment to Eliza H. Burdett of the Dunn and Vineyard tracts is mere matter of opinion, that it could not be rented out so as to yield any revenue, and that it could only be of value when controlled with the home tract. The same may be said of their assertion that the proportion of rolling land and river bottom of the home tract should not be separated. They should have stated the proportion of these lands, and how they lie, having a survey made, if necessary. And the only reason assigned for keeping the 1,778 acres together is that "the railroad runs through it, cutting off on one side almost all the running water." But the fact stated is wholly insufficient to show that so large a body of land may not be divided. The ex-

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ceptions to the report are clearly well taken, and should have been sustained.

The course of the commissioners has, no doubt, been taken, and their report made, in accordance with the wishes of the adult parties, the father representing his infant children. The partition made is in reality a family settlement, supposed, we doubt not in all sincerity, to be manifestly for the interest of the infant defendants. But the provisions of the Code in relation to the partition of land were not intended for any such purpose, or to effect a sale of the land of infants because for their benefit or interest. They were designed to secure partition in kind, and the authority to charge the larger shares with sums necessary to equalize can only be exercised when an exigency for unequal partition clearly exists. It is scarcely conceivable that such an exigency can ever arise which would justify an unequal partition to the extent of one-half of the interest of a tenant in common in land, especially where the land is in several tracts and large bodies. There are special provisions of the Code to effect the sale of the land of infants when manifestly for their interest, which carefully guard their rights, and which must be pursued with reasonable strictness.

The chancellor's decree will be reversed, and the report of the commissioners as to the 2,839 $\frac{7}{8}$ acres set aside, and the cause remanded for further proceedings. The decree will be allowed to stand as to the residue of the report not excepted to. The complainants will pay the costs of this court.

Coal Creek Mining Company v. Heck.

THE COAL CREEK MINING COMPANY v. J. H. HECK
et al.

1. **CONVEYANCE.** *Exception in. What it means.* An exception is the taking of something out of the thing granted which would otherwise pass by deed, and it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor in the deed made grantee by the exception.
2. **SAME.** *Exception and Reservation. Difference between the terms of no benefit.* Under our system of conveyances, where all instruments are treated as mere contracts, in which the intention of the parties is to be arrived at, the distinction between *exception* and *reservation* is of no importance.
3. **SAME.** *Deeds purporting to be interpartes.* A deed purporting to be *interpartes*, by which an estate is conveyed to the grantee, the deed being accepted by the grantee, is held to be the deed of both parties, though only signed by the grantor.
4. **CONVEYANCE MUST CARRY THE ENTIRE INTEREST.** The legal effect of a conveyance must be to convey all the right owned at the time of making the instrument, whether in contract or by deed of conveyance, and that whether there is or is not a warranty of title, either general or special.
5. **MARRIED WOMEN.** *Conveyance by. Defective acknowledgment.* A deed of a married woman, even though registered upon a defective acknowledgment, in that form would be notice to no one, she alone conveying in the deed and the husband joining for conformity, but giving no warranty.
6. **SAME.** *Same. Effects as against intervening purchasers.* The deed of a married woman only takes effect as against intervening purchasers when it is properly acknowledged and registered, but it can not relate by amendment so as to affect them.
7. **ADVERSE POSSESSION.** *Interference between titles. Bar by statute.* The possession of land so as to produce a bar under the statute must be an actual possession of some part in dispute. Where there is an interference between titles, if one of the adverse claimants is in posses-

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sion of the land within the boundaries of the grant, but not on any part of the interlap, the statute does not begin to run. But the moment he occupies the land included in the other's grant and holds possession, either by himself or another, the statute commences to run.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

ANDREWS & THORNBURGH and LUCKEY & YOE for complainants.

WEBB & MCCLUNG, HENDERSON & JOUROLMON, W. P. WASHBURN, W. M. BAXTER, C. J. SAWYERS and W. H. PACE, for defendants.

FREEMAN, J., delivered the opinion of the court.

The bill of complainant was filed December 7, 1881, to assert a title to land described as follows: Beginning at a large white oak, also the northeast corner of 26,086, made to H. Wiley, and which corner is eighty poles north of a stake, four poles below Bowling's Mill on Coal creek; thence north 45° west twelve hundred poles to a chestnut tree at the northerly side of a path from Ben Wheeler's to the widow Turner's; thence south four hundred and ten poles to the northerly line of a tract of land conveyed to the Coal Creek Mining and Manufacturing Company by H. H. Wiley, W. S. McEwen and Charles A. Bulkley, by deed registered in the register's office for said county of Anderson, in Book C, vol. 2, pages 10, 11 and 12; thence with the last mentioned line nearly east to a mountain oak, the northwest corner of said grant

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to H. H. Wiley; thence south about 55° east with the line of said grant to the beginning, the said tract of land being part of grant No. 22,267, made by the State of Tennessee to Thomas B. Eastland.

Defendants, it is charged, claim title to the land sued for under conveyances made by H. H. Wiley, deceased, and the executors of W. S. McEwen, deceased, but they are alleged not to have had any title to said land, but that their heirs, executors, and all persons claiming under them, are estopped from claiming said land by the terms and provisions of a certain writing in the form of an agreement of compromise between said Bulkley, Wiley and McEwen, made December 25, 1871, and which is filed as an exhibit to the bill. It is claimed that this agreement provided that Bulkley should convey to complainant said grant No. 22,267, which he accordingly did, and that Wiley and McEwen, being officers of complainant at the time of the conveyance by them of said land to defendants, were bound to protect complainant's property, and so no title passed to defendants as against the company to their vendees, the respondents. The prayer is, that the claim of respondents be declared a cloud on complainant's title, and for a decree that complainant owns the fee of said land, for a writ of possession, and an account for waste, for removal of coal, cutting timber, etc., and for general relief.

The land described above is claimed to be part of grant No. 22,267, made by the State of Tennessee to Thomas Eastland, and the estoppel sought to be set up

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in the bill is against any title derived from McEwen and Wiley, and all persons claiming under or through them, and is rested, as is seen, on the face of the agreement referred to.

Respondents deny the allegation of the bill that McEwen and Wiley never had any title to the land in dispute, and were not owners thereof, and claim that by an inspection of the exhibit to the bill it will be seen that it is specially stipulated that all the land lying outside of the 40,000-acre boundary therein referred to, was to belong to McEwen and Wiley. It is then averred all the land herein sued for did lie outside of said boundary, and so remained the property of said McEwen and Wiley, and that they had held actual and adverse possession of the same for more than twenty-five years, with the exception of a small tract. It is also insisted that for a long time after March, 1872, McEwen, Wiley and Bulkley were the sole stockholders in said corporation, and practically construed the said agreement to mean as maintained by respondents, and that Bulkley had acquiesced in the claim of Wiley and McEwen until 1878 or 1879, and the now complainants, until the filing of this bill.

Without going into the details of the pleadings further, it suffices to say that respondents claim to have purchased from Wiley and McEwen, and to have regular conveyances from them or their representatives, and then with proper averments plead they are innocent purchasers, without notice of any equity whatever, and in fact that none exists as against them.

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On the hearing the chancellor dismissed complainant's bill, from which there is appeal in error to this court. The Referees report adversely to the chancellor's decree, and recommend a reversal, to which defendants file various exceptions.

Objections are made that the exceptions filed are insufficient to raise the questions, but on looking at them we think they fairly open all the questions, and are in reasonable conformity to the statute, and the practice under it, as adopted by this court. The briefs furnish such references to the record as to the facts as have been uniformly accepted by this court, and the exceptions, with one exception, sufficiently point out errors of law, and raise vital questions in the case.

In order to present the first question to be decided in this case on these pleadings, it suffices to say, complainant claims to hold grant No. 22,267 by a regular chain of conveyances from the original grantee. It claims that this grant is the oldest grant, with the oldest entry, and, covers the land in dispute.

Defendants claim the larger portion of the contested land under grant No. 22,273, with mesne conveyances granted to them, or what is adjudged to be equivalent to a conveyance, a reservation of "such part of the grants specified as conveyed, as lie outside of what is known as the 40,000-acre boundary" in a deed made by Charles A. Bulkley, W. S. McEwen and Henry H. Wiley, conveying the land to complainant, the coal company; this deed dated April 22, 1872.

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That deed is evidently made in pursuance of the agreement of December 25, 1871, though it is not so stated on the face of it, the consideration for the large body of land then conveyed being nominal—one dollar.

It is proper to say here that the main contest in this case, or the contention involving the largest amount of land, grows out of an interlap between the lines of grant 22,267 and grant No. 22,273. Conceding complainant owns 22,267, the question is, whether the facts in this record give complainant or defendants the better title to the land held by them under 22,273 embraced within the lines of complainant's grant. By the deed of Bulkley, Wiley and McEwen, above referred to, conveying the large body of lands, consisting of six grants of 5,000 acres each, referred to by simple number of grants, and another large body of 40,000 acres each, giving its boundaries by calls and specific description, there are found two exceptions, first, of "a fifty-acre tract within said boundary purchased by said McEwen and Wiley from John Reynolds, which is not to be embraced in this deed," but "the same is hereby expressly excepted and reserved by said McEwen and Wiley, and is bounded," etc. After the description of said fifty acres follows: "and it is further understood that such part of the grants hereinbefore designated as lie outside of the 40,000-acre boundary (which had been before given definitely) are not hereby intended to be conveyed, but are expressly excepted and reserved to said McEwen and Wiley." Then follows the *habendum* clause to the company of

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all the land thus described, with a covenant of special warranty, to-wit, the parties "covenant and agree for themselves, their heirs, representatives, to warrant and defend the title to the said several tracts of land against any claim to be made by themselves, or by any person claiming through or under them, but no further or otherwise." In the enumerated six grants referred to as conveyed by the above deed, is found grant No. 22,273, and the main part of the land now in contest is the part of the land embraced in the calls of said grant, lying north of the boundary of the 40,000 acres, consequently outside of it. Bulkley, at this date, is assumed to have owned 22,267, but caused it to be conveyed to the complainant by deed of date December 16, 1872, made by himself and wife afterwards, simply describing the land conveyed—this and another grant—by the number of the grants. Bulkley, in this deed, gives no covenant at all as to the title, and the wife only a special, and that a very special one, against any act of hers by which the title or "any part thereof now or at all times shall or may be impeached."

It is proper to say, that by the agreement hereinbefore mentioned (Ex. A), the parties to it, McEwen, Wiley and Bulkley, were to procure a charter of incorporation for mining and manufacturing purposes, "and when obtained they" were "to convey to said company all right, title and interest which they may have in and to said lands included in the grants and boundary above mentioned, with the exception of the fifty-acre tract bought by McEwen and Wiley from

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John Reynolds, *and such portions* of said grants as may lie *outside of the boundary of the 40,000 acres above set forth.*"

From this it is seen clearly that this conveyance referred to was made in pursuance of, and in execution of the agreement, and was intended by the parties specifically to exclude from its operation both the fifty-acre tract and the land within the deed lying outside of the 40,000-acre boundary, and to give the same to McEwen and Wiley as against the company. It is to be remarked the land thus agreed to be, and conveyed, was to make up the capital stock of the company, for which shares of stock were to be issued to the three parties on a specified basis.

With these facts before us, what is the legal result of this reservation to McEwen and Wiley of the lands outside of the 40,000-acre boundary, the line of which is undisputed? We need not notice the distinction found in the books between an exception and a reservation, as the language of this deed is both "excepted and reserved," and the full effect of both was intended as against the company.

Mr. Washburne, Vol. 2, Real Property, page 686, says: "An exception is the taking of something out of the thing granted which would otherwise pass by the deed, and, it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor in the deed made the grantee by the exception." "It must," he adds, "be a part of the thing included in the grant, and taken

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in substance out of that, in which respect it differs from a reservation, which is defined to be some new right not *in esse* in substance at the making of the grant." We take it, under our system of conveyancing, treating all instruments as mere contracts, in which the intention of the parties is to be arrived at from the language used by them, in connection with the surrounding circumstances, the result would be the same in either case, and the distinction stated be of no practical importance. The land excepted and reserved in this case is well described as being the land included in the grants referred to in the deed outside of the boundary of the 40,000-acre tract. The grants referred to specifically define the lands embraced in them, and the 40,000-acre boundary renders certain where the exception is to be found.

The effect of an exception or a reservation in this view is held by all the authorities to be "that the same consequences attach to such exception as would have attached had it been a grant: Wash., vol. 2, 688. And so it was held by this court, *Crouch v. Shepherd*, 4 Cold., 389, that the reservation in a deed of the right to build a water lane, and the use of the water, give to the reservee an absolute right to use it." "The reservation is held to be a grant to a right out of the granted premises by force and effect of the reservation itself," and a deed purporting to be *inter partes*, by which an estate is conveyed to the grantee, if the deed is accepted by the grantee, is held to be the deed of both parties, though only signed by the grantor: *Caraway v. Caraway*, 7 Cold.,

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245, citing 2 Zabriskie, N. J. R., 311; Coke on Lit., vol. 2, 271-2. Much more would it be so in this case, where the deed is made and signed by all the grantors, and is accepted by the coal company as the muniment of title under which it holds the land. The deed on its face purports to be an "indenture made between" McEwen, Wiley and Bulkley and the Coal Creek Mining and Manufacturing Company, and so that company is unquestionably bound by its terms. They operate, to say the least of it, as a grant by said company by way of estoppel, and no title can be asserted by it as against this grant, certainly none existed in the company, either by contract or conveyance, at the time of accepting the deed, or made afterwards in pursuance of such a contract then in existence. This would be for a party to convey by a solemn instrument or reservation, and at the same time to defeat that conveyance by virtue of a right or claim to the land held by such party at the time of the conveyance. The legal effect of his conveyance must be to convey all the right then owned, whether in contract or by deed of conveyance, and that whether there is or is not a warranty of title, either general or special.

It is, however, most earnestly argued that the conveyance above referred to conveys only the grant, or by reference to the grant, and that inasmuch as grant No. 22,267 is older than grant No. 22,273, and the two grants interfere, the conveyee only took 22,273, subject to the dominant grant, 22,267. The case would be this: A party holds by grants two

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tracts of land, or by deed, for the result would be the same. The two tracts by their boundaries interlap each other. While thus owning both tracts he sells the one held under the junior grant or deed to a third party, "the following described tract of land," to use the language of this deed, "granted by a given number, reference being had to said grant for a specific description of said land." Could the vendor in this case be heard to say, in an action of ejectment even, much less in a court of equity, that he was entitled to assert his older and superior title by the other grant, and recover the land included in the interlap between the two? We take it the statement of the case in this form would be its own answer. If the other title is to be asserted, and the vendor retain the right to it, all would feel, as a matter of sheer justice, it should be "so warranted in the bond," or the subject of contract, otherwise the party has conveyed a deceptive title, nominally and by its plain terms extending to the boundaries of the grant referred to for description, but in fact only covering a less boundary, and then he with one hand is to be held to have conveyed, and with the other not, and to be entitled to dispossess his vendee of a portion of the land conveyed. To make the case stronger, you have but to suppose the older grant had covered the entire younger grant, then the vendee on this principle would get nothing—a result, when put in this form, that no one would seriously ask this court to approve.

The case of *Dyer v. Yeates*, 1 Cold., 137, is cited

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to sustain the contention. In that case both parties claimed title from the same source, to-wit: the grant to Thomas Loyd for fifty acres of land. The executor of Thomas Loyd sold the land first to Yeates, and made him a deed therefor. There was an admitted error in one of the calls of the grant, "the third corner being a white oak, and on the face of the grant the call is from that white oak south 149 poles to the beginning," which was a post oak, then dividing the tract, which was in the form of a parallelogram, into two parts by a diagonal line. The deed to Yeates followed the erroneous call of the grant.

On the assumption that the deed only conveyed according to the palpably erroneous call, the executor sold the other part of the tract up to that line as called for, giving him a just claim. The contest was as to which should hold the land. The main contention before the jury, the action being trespass, was whether the executor at the time of sale proclaimed publicly that he sold only to the contested line, and not the entire tract, and the jury having found the fact that way, this was conclusive of the case.

But the court adds: "There really never was any dispute as to the correct line. The lines had been plainly marked at the time of the original survey, and this fact was well known to the executor at the time of the sale to Yeates. The error in the grant was not material, though its calls literally pursued did not take all the land conveyed by the entry, and appropriated by the survey and marking of the lines,

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because on the facts stated, as a matter of law, "it did convey all the land, and vest the grantor with a legal title to the same as fully as if the calls had exactly conformed to the entry and survey—the law corrected the erroneous call, and supplied the proper calls without any correction in point of fact. We cannot see how this case, on its facts, can have any bearing on the proposition sought to be maintained here. It is simply that a party as against his vendor, or one claiming by subsequent deed under him, shall get all the land properly included within the calls of his deed. In this case there is no mistake or denial that the calls of grant No. 22,273 include the land in dispute, but it is insisted it shall be cut down by reason of the superiority of grant No. 22,267, now owned by complainant under a subsequent deed from the same vendor, and, as we have held, one binding complainant as well as their vendor or conveyor. The principle of the decision on the facts of the case, and that is the extent to which it is authority, is against complainant's contention.

The only claim of defendants is, that they shall have all the land conveyed and actually included in the boundaries referred to in the conveyance or reservation to them. The argument that the conveyance by reference to the grant, only conveys the grant or title in the grant as against an adverse claim of the vendor or persons holding under him by subsequent conveyance, is one not supported by any authority which we have seen, and in the language of one of the learned counsel for complainant, in reference to

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another aspect of the case, "too *tenuous*" to be entertained or approved by a court administering practical legal justice. A few additional considerations serve to strengthen the theory of this opinion. The holder of two bodies of land, by different conveyances which interlap, the one title superior in the hands of a third party, has merged the conflict into a single title in himself. It could never be assumed that when he became owner of both titles, he was still keeping up the adversary titles as between his own tracts of land, and one title was being held adverse to the other. This would be absurd. Suppose he had bought the adverse and stronger title, in order to perfect his right, it would be clearly his purpose to extinguish the conflict.

Several analogous cases might be cited in support of the conclusion we have reached on this aspect of the case. It cannot be denied that the land excepted and reserved in the deed to the coal company, and included in the boundaries of grant 22,273, has, by its terms, been conveyed to the vendors of respondent. It is settled by numerous cases in our books that if a party stand by and encourage a sale of his own land, as by witnessing a deed conveying it, or having boundaries including it, with knowledge of the contents of the deed, he is afterwards estopped as against the conveyee in that deed, and all persons claiming under him, to assert even an otherwise valid, legal and superior title in himself. Our cases require in addition that he must speak out and forbid the sale. See Meigs' Dig., (Milliken), vol. 2, sec. 1349, pages

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1755-6; much more shall a party who actually makes such a deed, and equally so as to the party accepting such a deed, in which the land is reserved to parties therein specified. The result is, that by the conveyance referred to the complainant, the parties being in fact the sole stockholders in that company, and practically conveying and reserving to and from themselves in this case, the parties to that deed are estopped to assert title as against its terms, and a purchaser under the reserves, will take a good title, as against a subsequent conveyance by one of the same parties to the acceptor of such a deed.

We need not discuss, in the view we have taken of this case, the effect of a quit-claim deed, as it is called, or one with special warranty, in putting the holder of it at his own risk as to title, except as against the covenantor and persons claiming under him, as in the case of *Lowry v. Brown*, 1 Cold., 456.

Such a deed only raises, by that case, as well as the other cases in our books, a presumption, or rather furnishes the basis of inference of fact, that the vendee has possible knowledge of a superior title, and puts such party on inquiry as to the validity of the title thus acquired. But this fact may always be explained and met by other facts, and in this case, if it were necessary, the facts would probably sufficiently meet the inference. The parties had all mutually claimed these lands as against each other, and therefore may well have been satisfied to get each other's title without more than a special warranty as against each other. Besides, on the theory we have

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given, of which we can have no doubt, there was no adverse title after the deed containing the reservation, all the claimants joining in the deed, and conveying to the coal company, and this company accepting the deed with the reservations in it, estopped all these parties from asserting any adverse title in themselves, and so there was no adverse title, and certainly no notice of any of record in this case that could affect the present defendants, the deed from Bulkley and wife not appearing to have been legally registered by any thing in this record till after the commencement of this suit, in 1881. There is, it is true, a recital in the proceedings for its amendment as to the *feme covert* in New York, that it had been registered in Anderson county in Book X, giving the pages, but we need not argue that this does not affect defendants, who were not parties to that proceeding. The conclusion reached renders it unnecessary to discuss the agreement referred to as Exhibit A, as we think it could have no effect in changing the result. The parties have practically construed it in the deed made, and all the testimony serves to show that these defendants have purchased innocently, with no notice of any adverse valid title, and so are entitled to the land included in the interlap between grants Nos. 22,267 and 22,373.

We may as well say here that the deed from Bulkley and wife, even if registered on a defective acknowledgment of the wife, in that form would be notice to no one, she alone conveying in that deed, the husband joining for conformity, but giving no warranty.

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The deed of the married woman only took effect as against intervening purchasers, when it was properly acknowledged and registered; it could not relate by the amendment so as to affect them: 3 Cold., 505; 3 Head, 486.

The next question to be decided is, as to that part of the land in dispute, covered by what is known as the George S. Rich grant or tract. It is not denied that grant No. 22,267 is the older and superior title, and that there is an interlap between the lines of the two grants. Respondents assert title, under statute of limitations, under a possession commenced probably as far back as 1854, and continuous from that on to commencement of the suit, by one Sarah Graham and subsequent tenants. It is urged by complainants that this possession is not effective, because in fact she only enclosed a few acres of the land, and erected a house on the same, and it is sought to confine the effect of this holding to this enclosure. The testimony on this question is substantially as follows: Henry Wiley is asked—"State whether McEwen and Wiley ever had possession of the George S. Rich tract? If so, when did it begin, how long did it continue, and describe the possession? He answers—"We did put Mrs. Graham on that tract about 1854. She built a house, and cleared and fenced a field. The house, as I recollect, stood just outside of the line of the Julian F. Scott survey. The field was inside of the Julian Scott survey. Both the house and the field were inside the 1,500-acre tract. She lived there and cultivated the field six or seven

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years. When she left I rented the field to Disney, and he cultivated that field every year until about two years ago, when Henry Waterdorff leased it, and he lives there now."

On cross-examination he is asked: "You state in your direct examination, referring to the above question, that you leased to Sarah Graham. How many acres did she occupy?" He says: "She was put there with liberty to cultivate just so much and so little as she pleased within the George S. Rich survey. I think she only enclosed some two or three acres." Other witnesses prove that Mrs. Graham and her son, who lived with her, claimed to hold under Wiley, and not for themselves. The meaning of this is, that the witness swears, in answer to the question whether McEwen and himself ever had possession of this land, that they had, and it was by putting Mr. Graham in possession about 1854. On cross-examination, when asked, "how many acres did she occupy?" he says, "she was at liberty to cultivate just so much or so little, as she pleased, within the George S. Rich tract, and she only enclosed about two acres;" that is, she was put into possession of the tract, and thus we were in possession, and being so in possession, she only enclosed and cultivated the small amount stated, but was at liberty to cultivate as much as she chose.

From the case of *Napier v. Simpson*, 1 Tenn. R., 453, down to the present time, it has been uniformly held, "that the possession of land, so as to produce the bar, must be an actual possession of some part in dispute." All our cases go on the idea that where

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there is an interference between titles, if one of the adverse claimants is in possession of land within the boundaries of his deed or grant, but not on any part of the interlap, the statute does not begin to run against him. But the moment he occupies the land included in the other's grant, and holds possession, either by himself or another, the statute commences to run: *Talbot v. McGavock*, 1 Yer., 262; *Stewart v. Hains*, 9 Hum., 715; 3 Head, 304; 2 Sneed, 199.


The case of *McClung v. Ross*, 5 Wh., 583, Cart. Ed., is cited to support the contention that this possession only extended to the enclosure made by Mrs. Graham. In that case it appeared "that Minott had a contract for the sale and purchase of part of the tract of 5,000 acres sold by Donelson to Ross, and his contract with McClung was a sale of McClung's part of the same land, on condition that he would hold the whole tract for McClung and Hackett. The court say: "He does not allege that Hackett put him in possession of more land than was sold to him, nor does it appear that McClung put him in possession of any land further than the virtual possession which was to be implied from the agreement which has been stated. The possession of Minott was an actual possession of part of the land under a purchase. It was *his* own possession, and not the possession of Hackett and McClung. His agreement to hold the residue for Hackett and McClung, never having been followed by actual occupation of any part of that residue, could not be construed into such a possession as to affect Ross' title. This is all very

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well. But here we have no case of a purchase or holding for himself as to part, with an agreement not carried into effect, to hold balance for another; on the contrary, we have the simple case of a party claiming title to a large tract of land, putting another in possession of the land, and in actual occupation of a disputed part of it, and this party holding under him for the period sufficient to complete the bar of the statute. The fact that only a small quantity was cultivated does not change the result. There was no limitation on the possession given, and the owner of 22,267 could have brought suit against this occupant at any time, or if he had ousted the tenant, and occupied the vacant place by himself or tenant, it would at once have broken the possession of the holder of the other grant, and if continued for seven years, would have given title to the extent of his boundary. We think the possession thus proven vests title to the whole tract into which Sarah Graham was put in possession, regardless of how much was actually enclosed.

We would probably reach the same result upon other considerations. But we find it would make this opinion too cumbersome were we to undertake to discuss all the questions presented in the able arguments of counsel in this case. We, therefore, content ourselves with the settlement of the questions discussed as conclusive of the result, and which we feel satisfied gives the legal rights of the parties to this controversy.

The decree of the chancellor is affirmed, report of Referees disapproved, with costs.



Ray v. Proffet.

A. L. RAY v. DAVID PROFFET *et al.*

1. **SURETY.** *Debtor. Collateral security.* An indemnity or collateral security, given by a debtor to his surety, inures to the benefit of the creditor, who may subject it in equity without even a judgment against the debtor.
2. **TRUSTS.** *Suit by the ultimate receiver of the money.* The person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself.
3. **COURTS OF OTHER STATE.** *Presumption of regularity.* Where a judgment rendered by a court of another State is regular upon its face, the presumption is in favor of its validity and regularity. It need not affirmatively appear that the parties were all served with notice.

FROM UNICOI.

Appeal from the Chancery Court at Erwin. H. C. SMITH, Ch.

S. J. KIRKPATRICK and WEBB & McCLUNG for complainant.

I. E. REEVES and H. H. INGERSOLL for defendants.

COOKE, J., delivered the opinion of the court.

Complainant, A. L. Ray, and the respondents, Proffet and Edwards, were the sureties of one Solomon M. Ray, upon his official bond as sheriff of Yancey county, North Carolina, for some years preceding and up to 1860. Said sheriff embezzled a large amount of monies which he had collected as

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such, and fled to Tennessee, where he invested about \$4,500 of said funds in a tract of land. A number of judgments were taken against said defaulting sheriff and his said sureties in Yancey county, North Carolina, a portion of which were paid by said sureties, or some of them, but, perhaps, the larger portion of them remained unpaid.

Said sureties, Proffet, A. L. Ray and Edwards, in 1869, came to Tennessee, by their agent, and filed a bill against the heirs of Solomon M. Ray, who, in the meantime, had died, alleging that said land was purchased by said Solomon M. Ray with monies that he had collected and embezzled as sheriff, and for which they, as his sureties, had been held liable, some portions of which, they alleged, they had paid, and were liable for the residue as his sureties, and seeking to have said tract of land attached, and held subject to their reimbursement for what they had actually paid, and their indemnification for the debts for which they were liable, or the satisfaction of the same. In August, 1873, a compromise decree was rendered in said cause, by which the complainants recovered three-fourths of said land. This suit had been instituted and prosecuted by one Hensely—as the agent of the complainants—who was the son-in-law of Proffet, and by the same decree it was recited that it appeared “that complainant, David Proffet, had paid the whole of the debts against S. M. Ray, the right to said three-fourths of said tract of land is hereby vested in him;” and partition of said tract of land was made between said Proffet and the heirs

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of S. M. Ray, and the title to the lands thus assigned to respondent, Proffet, vested in him. Thereupon, A. E. Jackson, who had obtained a judgment against said sheriff and his said sureties in Yancey county, North Carolina, filed his bill against said Proffet as one of said sureties and one of the defendants in his said judgment, attaching said land, and seeking to subject it to the satisfaction of the same. This cause was litigated for a considerable time, and finally a decree was rendered in favor of Jackson, subjecting the land to sale for the satisfaction of his judgment, and which decree was affirmed on appeal by this court at the September term, 1877, and on November 26, 1877, the original bill in this case was filed by complainant, A. L. Ray, against Proffet and Edwards and Jackson, alleging that the liabilities against said sureties had not, in fact, all been paid by said Proffet, that he, complainant, had paid a large portion of the same, and that the procurement of said decree, vesting the title to said land exclusively in Proffet, was a fraud upon him, and asking that the same be set aside, an account taken, and his interest declared in said land in proportion to the amount of said debts so paid by him, etc. In this bill he also alleged that the object of said original bill filed against Ray's heirs by said sureties was to indemnify themselves from the liabilities they were under as such sureties, and to reimburse themselves for such as they had already paid. The sale of said land, under the decree of this court, in the case of Jackson against Proffet was enjoined.

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Proffet denied by his answer the fraud alleged, and also denied that complainant, A. L. Ray, had paid any portion of said liabilities, but to avoid the same he avers he had fraudulently disposed of all his property in North Carolina and become insolvent, and insists that he, Proffet, had paid all of said liabilities which had been paid by any of said sureties. Jackson, by his answer, avers that said S. M. Ray, as sheriff, had collected and embezzled monies due him, and for which he had obtained a judgment against said sheriff and the complainant, as well as Proffet and Edwards as his sureties; that his money thus embezzled by said S. M. Ray was a part of the monies with which he purchased said land. He also insists, in substance, that as the object of the bill under which the title to the land was decreed to Proffet was not only to reimburse the sureties for debts which they had paid, but to indemnify them against other liabilities still existing against them as such, and as his judgment was at the time one of these very liabilities, the vesting the title in Proffet, under the objects of the bill, carried with it a trust in favor of the creditors, and gave him an equity in the land, to the extent of his debt, which his bill and attachment fastened upon the land, the legal title being in Proffet, and gave him a superior equity to any complainant might have; and, also, that he is entitled as one of the creditors of said sheriff, S. M. Ray, for the indemnity against whose debts the land was attached by said sureties, to have said land or its proceeds applied directly to the satisfaction of his

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debt as a security for the same in the hands of said sureties.

He also filed a cross-bill in which he substantially assumes the same ground, and alleges that, as his judgment was against the complainant and Edwards, as well as Proffet, if by any means the complainant should be held to have any interest in the land, that the same be held subject to the satisfaction of said judgment. Complainant, A. L. Ray, by his answer to this cross-bill, denies that Jackson recovered any judgment against him, but if he did, he says, it was more than ten years before the filing of his cross-bill, and pleads and relies upon the statute of limitations of ten years as a bar to any recovery upon said judgment.

The injunction was dissolved pending the litigation in the chancery court, and the land sold under Jackson's decree of sale in this court, and purchased by him at a sum less than the amount of his judgment, interests and costs. The sale has been confirmed, and the title to the land vested in him.

The chancellor decreed that complainant, Ray, was entitled to the relief sought by his bill; that the recovery was for the benefit of the sureties jointly, and for their indemnity, and the taking the title in the name of Proffet was a fraud upon the rights of complainant, and ordered an account to ascertain what amount of debts or liabilities of said sheriff had been paid by each of said sureties, and decreed them entitled to the land in the proportion in which they had paid debts for which they were so liable, and that Proffet should be held liable for rents during

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the time he held the land in possession to the other sureties in proportion as their interests should appear in said land; that Jackson was not entitled to any relief upon his cross-bill as against Ray, and dismissed it as to him; but that he was entitled, by virtue of his proceeding against Proffet, to whatever interest Proffet may appear to have in said land; that Jackson was liable upon his refunding bond, executed by him upon the dissolution of the injunction, for whatever damages complainant may have sustained, etc., and ordered an account, etc.

From this decree both Jackson and Proffet have appealed.

The Referees have reported that the chancellor's decree should be affirmed; the exceptions to which open the whole case.

The judgment recovered by Jackson against said sheriff, S. M. Ray, and his sureties, David Proffet, John Edwards, A. L. Ray, and one Gordon, was, upon January 22, 1861, in the court of pleas and quarter sessions of Yancey county, North Carolina, for the sum of \$589.95. It is objected that this judgment is not properly authenticated, inasmuch as it does not affirmatively appear anywhere that the defendants were served with notice. The judgment is regular upon its face, and is duly and properly certified by the proper officials of North Carolina as a judgment of that court, and the presumption is in favor of its validity and its regularity. The clerk of that court, in addition to his certificate required by law, also certifies that the files of papers, such as writs, etc.,

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were destroyed by the war. There is proof by the sheriff, and the attorney who took the judgment, tending to show that said A. L. Ray was actually served with process, but how this is, it is unnecessary to inquire. As before stated, the presumption is in favor of the regularity of the proceedings of said court in accordance with the laws of North Carolina, and the existence of said judgment is satisfactorily shown. This brings us to the more important question as to the right of said Jackson, as a judgment-creditor of said sheriff, S. M. Ray, and his said sureties, to subject the property of the principal in the hands of said sureties for their indemnity against said debt directly to its satisfaction.

In the case of *Breedlove et al. v. Stump et al.*, 3 Yer., 257, it was held that an indemnity or collateral security, given by a debtor to his surety, inures to the benefit of the creditor, who may subject it in equity without even a judgment against the debtor. In that case the court adopts the language of a decision in 7 Cranch, 97, in which they say: "It is settled in this court that the person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself." This language was again quoted and approved, and the principle decided, in *Saylors v. Saylors et al.*, 3 Heis., 530. The original bill having been filed to secure the land as the property of Solomon M. Ray, for the indemnity of the sureties against the liabilities they were under as such for the debt of Jackson and others, as well as

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their reimbursement for sums already paid, and it having been recovered in that right, and the title taken in Proffet, an equity or trust did attach to it for these purposes, and the legal title being in Proffet, Jackson had a right to attach it in his hands, and have it subjected to the satisfaction of his judgment: 2 Cold., 407; 5 Cold., 396. And so far as the right of Ray to reimbursement, so far as he had already paid the debts of other creditors of S. M. Ray is concerned, without reference to Jackson's judgment as against him, his equity could at most be only equal to that of Jackson, and Jackson having seized the land by virtue of his attachment, subjected it to sale, and acquired the legal title, has, even so far as this branch of the case is concerned, the better position. Where equities are equal the law must prevail. Ray therefore has no equity which he can enforce as against Jackson, even if admitted to the best attitude that can be assumed for him in this case. But he waited about four years after Proffet's recovery in the chancery court, and the filing of Jackson's attachment bill, and until ten years had elapsed after the recovery of Jackson's judgment on him and others, before he took any steps or made any complaint of said judgment or proceedings, and there are very strong grounds to suspect that his object in doing so was to enable him to interpose the statute of limitations of North Carolina of ten years as a bar to Jackson's judgment against him. It would be a very grave question whether he should be allowed to plead the statute under such circumstances, if it were necessary to de-

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cide it, but the view we have taken of the case renders this unnecessary.

It is insisted, however, that although Ray may not be entitled, as against Jackson, to any of the equities set up by his bill, yet as he was no party to Jackson's bill against Proffet, under which the land was sold, we ought now to set aside the sale, and order the land to be resold for the satisfaction of Jackson's decree. We are unable to see how this could be done; but as we have seen, Ray, if he had been a party to said bill, had no equity which he could have enforced as against Jackson, and Jackson having seized the legal title in the hands of Proffet, who held it, coupled with a trust in his favor as a creditor of S. M. Ray, and having, by virtue of his decree against Proffet, and sale, and his purchase thereunder, become possessed of the legal title, and his equities superior, or at least equal, to any that can exist in favor of Ray, will be permitted to hold it. It is said in argument that the land was sold for an inadequate price, and for that reason the sale ought to be set aside. There is no proof as to the value of the land, except that S. M. Ray gave \$4,500 for the entire tract in 1862, if this can be taken as any evidence of its value in 1878, when Jackson purchased it. He gave for three-fourths of the tract between \$1,100 and \$1,200, which was, as we have seen, less than the amount of his judgment and interest. But this would afford no grounds for setting aside the sale, as the land was sold at public judicial sale, by the clerk of this court, under a decision

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rendered by it, and purchased by Jackson, the report of sale confirmed, and the title decreed to him.

The exceptions to the report of the Referees as to this branch of the case will be sustained, and the decree to Jackson will be reversed, and the original bill as to him dismissed. In the view we have taken of the case there was no necessity for the cross-bill of Jackson, though it was, as a matter of precaution, proper to file it. As to the equities between Ray and Proffet, we think the taking the title to Proffet in the original suit was in fraud of the rights of Ray, as the proof, we think, shows that Ray had paid some small amounts upon the liabilities of said sheriff, and that Proffet had not paid all of said liabilities by any means, and perhaps no very great amount of them, but the greater portion of such as were paid was with means obtained from other sources, and as between them the decree of the chancellor was correct, and will be affirmed.

The complainant, Ray, will pay one-half the costs of this cause in this court, and the respondent, Proffet, the other half. The costs of the chancery court will be paid equally by complainant, Ray, and the respondents, Proffet and Jackson, one-third each.

Rhea v. Rhea.

PATSEY RHEA v. SAMUEL RHEA *et al.*

1. **HOMESTEAD.** *Power of husband to alienate.* The husband cannot alienate the homestead without the consent of the wife, nor can he deprive her of her right to its use by his wrongful act.
2. **SAME.** *Same. Whom the alienation affects.* The husband's conveyance is operative against himself alone and does not affect the rights of the wife.
3. **SAME.** *In what lands the wife may claim homestead.* Since the act of 1879, the wife may assert her claim to homestead to any lands to which the right attaches under the act, unless she has divested herself of the right by joining the husband in the conveyance of it in mode prescribed by statute.

FROM HANCOCK.

Appeal from the Chancery Court at Sneedville. H.
C. SMITH, Ch.

H. F. COLEMAN and H. H. INGERSOLL, for complainant.

H. T. CAMPBELL for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed by complainant in 1884, against her husband, Samuel Rhea, and Davidson and wife, purchasers of said Samuel, of a small tract of land for \$300. The bill prays for a divorce and for a homestead in the land sold to Davidson and wife in 1882.

In 1860, said Samuel Rhea abandoned his wife, and went to California with a loose woman whom he

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had been keeping, and remained away nine years, and returned with the same woman to near his former residence. In 1875 he purchased the land in question, and kept upon it the woman until she was succeeded by another of like character.

The defendant, Samuel, owned two small tracts of land in Hancock county, each worth about \$300, and lived upon the one in controversy, apart from his wife, at the time of his sale to Davidson and wife, having previously sold and conveyed the other. His wife refused to unite in the conveyance.

The chancellor decreed a divorce, and gave complainant a decree for the tract of land, and awarded a writ of possession. Davidson and wife appealed, and the Referees have recommended an affirmance of the decree. To their report appellants except:

First. Because complainant never lived upon, or in any way enjoyed the rents and profits of the land.

Second. Because the defendant, Samuel, has never lived with complainant since he bought the land, sold and conveyed to Davidson and wife, the latter being purchasers without knowledge of complainant's claim to the land.

We do not think either ground of exception is well taken. The act of 1879 exempts \$1,000 of real estate belonging to the head of a family, whether living upon it or not. The husband is the head of the family, and it is exempt for his use and the use of the wife and children. He cannot alienate it without her consent, nor can he deprive her of her right to its use by his wrongful act. His convey-

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ance is operative against himself alone, and does not affect the wife's rights.

Since the act of 1879, the wife may assert her claim to homestead to any land to which the right attaches under that act, unless she has divested herself of the right by joining him in the conveyance of it in the mode prescribed by the statutes. This she has not done, and the want of knowledge by Davidson and wife that the wife had such claim or right cannot protect them against the consequences which the law attaches to their failure to obtain her consent to the sale.

The result is, the report of the Referees recommending an affirmance of the decree is approved, and the chancellor's decree will be affirmed.

JAMES M. BARKLEY and WIFE v. C. E. DOSSER,
Trustee, etc.

1. TRUST. *Funds in trust. Power to dispose of the principal by deed or will. Absolute possession.* A fund in trust for the sole and separate use of a person, with the power to dispose of the principal fund by will or deed to take effect at their death, is not in legal effect an absolute gift, and does not give absolute possession to the extent that the person is entitled to recover the same from the trustee.
2. SAME. *Trusts created by will or deed, when active.* A will imposing the duty upon the trustee to invest the funds in bonds, etc., and apply the annual dividends or interest to the sole and separate use of a person, is an active or special trust.

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3. *SAME. When a trust estate terminates.* A trust estate terminates when the purpose for which it was created is accomplished.

FROM WASHINGTON.

Appeal from the Chancery Court at Jonesborough.
H. C. SMITH, Ch.

I. E. REEVES and H. H. INGELSOLI for complainants.

— — — — — for defendant.

COOKE, J., delivered the opinion of the court.

This was a bill filed for the construction of the last will and testament of Malvina Matthews, who died intestate in Wythe county, Virginia, in 1854, and to receive a fund alleged to belong to her from said trustee. The particular clause of the will upon which a construction is asked is as follows:

"I give and devise to my son, Granville H. Matthews, the tract of land upon which I now live, upon this special trust—to be sold by him when, in his opinion, it can best be done, and on such terms as he shall deem most expedient, the proceeds whereof he shall lend out on good security on real estate, or vest in Virginia or other government stocks, in his discretion. One-half of the annual interest or dividends therefrom I give to my daughter Malvina, and the other half to my daughter Eliza Lewis, as a fund for their separate and sole use and benefit, especially in the event of their marriage. One moiety of the principal arising from the sale of said land may be disposed of by each of my said daughters, either by

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deed, to take effect after their death, or by will, and not otherwise."

The trustee specified in this clause sold the land in pursuance of the trust, realizing therefor to the share claimed by complainant, Malvina, the sum of \$3,500, and continued for a time to execute said trust, when he died. Upon his death a trustee in his stead was appointed by the court in Virginia, who assumed the duties of this trust, and he and his successors continued to exercise the powers of the trustee until the said Malvina intermarried with complainant, James M. Barkley, when they removed to Washington county, Tennessee, where they filed their petition in the circuit court at Jonesboro for the appointment of a trustee in this State, and the removal of said fund from the State of Virginia to this State. Respondent, Dosser, was accordingly appointed such trustee by a decree of said court, and authorized to recover and remove said fund, etc., who executed bond as such, and entered upon the duties of said trust, and has received and had in his hands as such trustee the greater portion of said fund, and is proceeding to execute the trust according to the provisions of said will.

It is alleged in the bill, and insisted in the argument, that the bequest of the interest accruing from said fund for the sole and separate use of complainant, Malvina, with the power to dispose of the principal fund by deed or will, was in legal effect an absolute gift to her, and invested her with a right to the absolute possession and enjoyment of the fund

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in her own right, and that she is entitled to recover the same from the trustee.

The trust created by this clause of the will is an active or special trust, imposing the duty upon the trustee to invest the funds in bonds, etc., or to loan it upon a particular kind of security (real estate), and apply the annual dividends or interest to the sole and separate use of the complainant: 1 Perry on Trusts, sec. 19. The complainant took no title to the corpus of the fund during her life, that being vested in the trustee. Her power of disposition is restricted to one of two modes, and neither to take effect until her death. A trust estate terminates when the purpose for which it was created is accomplished: Perry on Trusts, sec. 312; 3 Tenn. Ch., 199; 1 Sneed, 304; 4 Cold., 25. The obvious purpose for which this trust was created was to preserve the *corpus* of the fund against the improvidence or extravagance of complainant and her husband, and thus secure the income or dividends to her use during her life; only upon the termination of which has she any power of disposition, and then only in the mode designated by the will.

The chancellor held that complainants were not entitled to the fund, and dismissed their bill. It was stated at the bar by complainants' solicitor that the Referees had reported that his decree should be affirmed, but neither the report, or the exceptions to it, are with the record, and we are unable to see upon what grounds it was based, but for the reasons above stated we affirm the decree.

Thomas v. Railroad Company.

ADAM THOMAS, Adm'r, etc., v. EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

1. PLEADINGS AND PRACTICE. *Writs of error. Section 3905 of the Code. To what cases it applies.* Section 3905 of the Code which grants a writ of error when an appeal in the nature of a writ of error has been dismissed because the record has not been brought up in time, applies to cases in which the appellant brings up the record.
2. SAME. *When appellant refuses to bring up the record after appeal.* When the appellant refuses to bring up the record, after he has been granted an appeal, the appellee may bring it up and obtain an affirmance of the judgment.

FROM BRADLEY.

Appeal in error from the Circuit Court of Bradley county. D. C. TREWHITT, J.

W. M. BAXTER for Railroad Company.

R. M. EDWARDS for Thomas.

DEADERICK, C. J., delivered the opinion of the court.

In the circuit court of Bradley county judgment was rendered, in May, 1885, in favor of the plaintiff, Thomas, against the defendant. The defendant prayed an appeal in error to this court, which was granted, and executed bond for said appeal.

In June the defendant, in writing, by its attorney, notified the clerk not to make out the transcript in the case, as it did not intend to prosecute said appeal. Thereupon the plaintiff in said cause directed the clerk to make out a transcript for him

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of said cause, which was done, and the record was filed in this court at the present term, and the defendant was notified that said record had been filed, and that he would move for an affirmance of said judgment at the present term. Accordingly, upon a former day of this term, the motion for affirmance of said judgment was made by plaintiff, and allowed, and the judgment pronounced affirming the judgment of said circuit court.

The defendant company now enters a motion to vacate said order affirming the judgment. The argument is, that in an appeal simply the judgment of the inferior court is vacated, and in such case there should be an affirmance in this court. But in the appeal in error the judgment is suspended only, and the proper judgment here would be to dismiss the appeal, leaving the judgment below in full force. And sec. 3905 of new Code is cited in support of this position.

That section provides, where an appeal in the nature of a writ of error *is dismissed*, on the ground that the record was not brought up within the time prescribed by the rules of the court, the appellant may, nevertheless, have his writ of error. That section applies to a case in which the appellant brings up the record.

That is not this case. The appellee brought up the record, and obtained his judgment of affirmance upon the ground that appellant, after his appeal was granted, had failed and refused to bring up the record. And this was held the proper practice in a similar

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case in 2 Sneed, page 1. This practice was approved in *Cauthon v. Searcy*, 12 Lea, 649, by this court, opinion by Judge Cooper, citing a number of cases.

The motion must, therefore, be disallowed.

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ISAAC HARMON v. R. F. TAYLOR *et al.*, Road Commissioners.

1. ROAD COMMISSIONERS. *Power to control litigation in regard to roads.*
Under the provisions of the act of 1881, as amended, which says, "the road commissioners shall have control of all highways and bridges in their respective districts," the commissioners have no power to control any litigation in regard to the opening of roads.
2. SAME. *Construction of the act of 1881 as amended.* The language of the act must be taken and construed in view of the purpose for which they were created, which was merely as subordinate agents, and the general supervision of the roads remains in the county court.
3. SAME. *Power of county court to exempt persons from working upon public roads.* The county court has authority to exempt persons from working upon the road, notwithstanding the act of 1881, which requires all persons to work on public roads unless released by the commissioners.

FROM HAMBLÉN.

Appeal in error from the Circuit Court of Hamblen county. J. G. ROSE, J.

W. S. KYLE for Harmon.

McFARLAND & DICKSON for Taylor.

Harmon v. Taylor.

COOKE, J., delivered the opinion of the court.

Upon the petition of certain citizens to the road commissioners of the third road district of Hamblen county, they laid out and reported to the county court a public road over the lands of Harmon. Exceptions were filed to said report, which were disallowed and the report confirmed. The case was taken by appeal to the circuit court, where the action of the county court was sustained, and Harmon appealed to this court.

Pending the case in this court, a compromise of the matter was made and entered of record in the county court, by and between Harmon and said county court, by which it was ordered that said litigation in this court should be dismissed, said road over the lands of Harmon discontinued or abandoned, and that Hamblen county should pay the costs. A copy of said record has been filed in this court, and a motion to dismiss the case in accordance with its terms. This is resisted by said road commissioners upon the assumption that they and not the county court have exclusive jurisdiction and control of the public roads of the county. Under the provisions of the act of 1881, chapter 38, sections 1 and 14, and as amended by the act of 1882, chapter 18, section 8, under which these proceedings were instituted, we do not think this position is correct. The language of the first section of said act of 1882, it is true, is general in its terms, that "they (the road commissioners) shall have control of all highways and

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bridges in their respective districts," but this language must be taken and construed in view of the purposes for which they were created, which was as mere subordinate agents in the conduct of the road system, the general supervision of which, by virtue of the general laws, etc., of its police powers, still remained in the county court, and although the litigation was nominally conducted in the name of said road commissioners, the county was the real party to the litigation, which speaks through the agency of the county court. By an express provision of said act, said commissioners are not to be liable for any costs, where they act in good faith.

In the case of *Willaford v. Pickle*, 13 Lea, 672, it was held that the county court has authority to exempt persons from working upon public roads, notwithstanding the provision of the fourth section of said act of 1881, "that all male inhabitants over eighteen and under fifty years of age, except such as are permanently disabled from performing common labor, *and are released by the commissioners, shall work*," etc. This was held not to repeal, by implication, the previous statute (Code, section 1620), authorizing the county court to exempt certain persons from working on public roads, and which sustains the position here taken.

We therefore hold that the county court is the proper authority to control said litigation, and the cause must be dismissed in accordance with its order and agreement.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
MIDDLE DIVISION,

NASHVILLE, DECEMBER TERM, 1885.

WILLIAM SPENCE v. THE STATE.

1. **CRIMINAL LAW.** *Juror. Competency.* A juror is not rendered incompetent to sit on the trial of an indictment for murder, by having heard or read in a newspaper that the defendant had killed the deceased about a settlement.
2. **SAME.** *Same. Newspaper statements.* Newspaper statements in a criminal offense, to disqualify a juror who has read them, must be such as fall within the disqualifying sources of information; any other statement amounting only to rumor, which would not disqualify.
3. **SAME.** *Same. Same.* A juror is competent in a trial for murder who states that he has an opinion formed from reading the newspapers and from talk in the neighborhood, which it would require evidence to remove; that he had heard that the defendant had killed the deceased about a settlement, and that was all that he had heard or read; that if taken on the jury he would try the case on the evidence as sworn to by witnesses, and not on what he had read or heard, and would do fair and impartial justice between the State and the defendant.
4. **SAME.** *Same. Loose impressions.* Loose impressions or conversations of a juror as to the guilt or innocence of the prisoner, founded upon rumor, would not, if disclosed by him or others to the court when the jury is selected, have the effect to render him incompetent, and, *a fortiori*, if disclosed after verdict, would not be a cause of new trial, a much stronger case being required after than before trial.

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5. *SAME. Motion for new trial.* When a witness, on a motion for a new trial, testified that a juror, after he had been summoned, said to him that "they ought to have hung him (the prisoner) at first and saved us the trouble," and that a person named also heard the conversation, and this person and the juror both testified that no such remark was made, and the trial judge overruled the motion, there is no ground for reversal by this court.
6. *SAME. Defense of insanity.* On a trial for murder, in which the defense was insanity, and there was proof that the prisoner was in the habit of using intoxicating liquors in large quantities, often to excess, but no proof that he was laboring under *mania-a-potu* at the time of the killing, the charge being full upon the subject of insanity from any cause, and of the effect of intoxicating liquors on the grade of homicide, it is not error to refuse the following special request: "If the jury believe from the evidence that the defendant, at the time of killing, was insane, or was laboring under the disease of *mania-a-potu*, produced by the use of intoxicating liquors, then he should be acquitted."
7. *SAME. Same. Burden of proof.* The jury having found that the defendant was not insane, and the trial judge having refused a new trial, the burden is upon the defendant in this court to show that there is a preponderance of evidence in favor of the defense.
8. *SAME. Same. Evidence.* Isolated incidents, scattered through several years, introduced to show insanity, which might be attributed to the excessive use of liquors, and more continuous acts not necessarily signs of insanity, amount to little where the defendant up to the day of homicide transacted business, traded and was traded with, and mixed in social intercourse with his neighbors and the community as a sane man, many of his friends of daily intercourse testifying that the idea of his insanity never crossed their minds.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. MATT. W. ALLEN, J.

PALMER & PALMER, WRIGHT & BULLOCK and
E. R. THURMAN for Spence.

ATTORNEY-GENERAL LEA and R. F. JACKSON for
the State.

Spence v. The State.

COOPER, J., delivered the opinion of the court.

The prisoner has appealed in error from a judgment of conviction of murder in the first degree.

William Spence, the prisoner, was for several years Marshal of the United States for the Middle District of Tennessee. He was succeeded in the office by his son-in-law, Edward S. Wheat. On March 11, 1884, Spence killed Wheat, between eight and nine o'clock in the morning, by shooting him with a pistol, at the crossing of College and Church streets, two of the most public streets in the city of Nashville. At this time, and for several years immediately preceding, Spence was, and had been living a few miles from the city, and supporting himself and family by bringing vegetables and milk to market. Wheat was the member of a firm having a business house on the corner of Church and Market streets, and resided on High street, a short distance north of Church street. The direct route from Wheat's residence to his place of business was from High to Church street, thence along Church street east, crossing Summer, Cherry and College streets, to Market street. There is proof that two or three weeks before the killing Spence called at the business house of Wheat's firm, and went up to a room in the second story where Wheat then was. After the customary greeting, defendant said to Wheat he wanted a settlement, repeating the words twice. Wheat replied, he would give him a settlement, but would not give him any more money, adding "you have been a trouble to me and

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my family for a long time." Defendant said: "It did not come out of your pocket." , Wheat replied: "It did." Both at this point seemed, according to the witness who details the interview, to be angry. Defendant then said: "It did not," adding some words which the witness did not hear. Wheat replied: "You are a liar," and took defendant by the collar, and drew him towards himself with one hand, and pointing with the other in his face, said: "You are an old man, and your age and gray hairs are all that save you; get out as quick as you can." Defendant then went out, saying something which the witness did not hear. After this interview there is proof that from eight to twelve days before the killing, the defendant applied to three different persons at different times to borrow a pistol. To one of these persons, who asked him what he wanted with a pistol, he replied: "I have a settlement to make, and may need one." The defendant spent the night before the killing at a hotel on Church street, near High street, being the only time he had ever staid there, and on the next morning was observed to occupy a position in the office of the hotel from which he could have a view of Church street. And he also suddenly left a witness with whom he was talking, as if he had seen something which called him away. About that time Wheat came from High street, and crossed over to the south side of Church street, walking along that street towards his business house. He stopped for a few minutes at a cigar store, and while in the store there is proof tending

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to show that defendant was watching him from the opposite side of the street. When he came out, and proceeded in the direction of his business house, the defendant crossed over to the same side of the street, and followed him in a faster walk. The defendant called to Wheat twice, and at the second call Wheat looked over his shoulder as if he recognized defendant, and went on without saying any thing that the witnesses heard. Defendant followed at a quicker pace, and, as Wheat was crossing College street, came within five feet of him, and shot him in the back. Wheat sank on his knees, and fell backwards, partly supported by his right elbow. Defendant moved around in front of Wheat, and remarked: "You choked me, did you? you'll never choke me again," and immediately fired another shot into his breast. Either shot would have been fatal, the fallen man dying in a few seconds. To the question by a friend, who was one of the first persons who came up, defendant said it was his son-in-law, Ed. Wheat, whom he had killed, using an oath and a vituperative epithet in regard to him, and added: "I tried to get a settlement from him, and he choked me." He repeated the same explanation to other witnesses. Defendant also said to his friend: "He is dead, and if he is not dead, I will shoot him again."

It is not denied that these facts, which the jury may well have found, make out a clear case of murder in the first degree.

The first error relied on for reversal is in the action of the court in pronouncing W. J. Taylor a

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competent juror. After the defendant had exhausted all his challenges, Taylor was presented as a juror. He stated on his *voir dire* that he had an opinion formed from reading the newspapers, and from talk in the neighborhood; that it would require evidence to remove this opinion; he had heard Spence had killed Wheat about a settlement, and that was all he had heard or read; did not know either of them; that if taken on the jury he would try the case on the evidence as sworn to by the witnesses, and would not try the case on what he had read or heard, and could do fair and impartial justice between the State and the defendant; that he did not remember having read the testimony given before the coroner's jury.

In *Conatser v. State* 12 Lea, 436, we had occasion to review the decisions of this court upon the competency of jurors in criminal cases, and to ascertain the general principles which might be considered as settled thereby. We found that the question whether the nature and strength of a juror's opinion are such as in law necessarily raises the presumption of partiality, is one of mixed law and fact, to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence, and that the finding of the trial court, before whom the juror gave his testimony in person, would not be set aside by the reviewing court except for manifest error. The burden is upon the challenger to show the actual existence of a disqualifying opinion. We held that if the opinion of the juror go only to the fact that a person has been killed, and that the defendant killed

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him with a particular instrument, in a case where these facts could not be disputed, he would not necessarily have a disqualifying opinion. We also held that if the opinion of a juror be clearly such as disqualifies him, no inquiry is permissible whether, notwithstanding his opinion, he will be governed by the evidence alone, but that it is otherwise when the opinion is not based upon evidence or information that disqualifies. And that the law does not regard what the juror may call an opinion as an opinion at all, unless based upon knowledge or reliable information of facts, and the state of the mind of the juror in such case as to what weight he would give to the evidence to be introduced becomes an important element in ascertaining his competency. As a result we held that a juror was competent in the particular case who had heard persons say that the prisoner had killed the deceased with a hoe at a road-working, who did not know whether these persons were witnesses or not, nor whether they had heard the evidence or not; who had the same opinion still, which was a fixed opinion from rumor, and that it would take evidence favorable to the prisoner to remove it, but that he could disregard that opinion, and be governed in his verdict by the evidence.

In the case before us, it is conceded that if the juror had merely said that he heard that the defendant had killed Wheat, he would upon the statements on his *voire dire*, have come within the rulings of the *Conatser* case. But it is argued that the additional statement that the killing was "about a settle-

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ment" took the case out of the rule. The fact that the juror had heard that the defendant had killed the deceased with a particular instrument, if undisputed, is, as we have held, immaterial. And it is difficult to see how the additional fact of the cause of the killing, if equally undisputed, could change the result. For the cause would not ordinarily fix the blame on either party, or show the nature of the offense. That is certainly so in the present case. And the testimony, as we have seen, is that the defendant himself at the time, and always, said that the difficulty originated in his wanting to get a settlement from the deceased. But the answer to the argument is that what the witness had heard and read was mere rumor. He had not read the testimony given before the coroner's jury, nor so far as appears any detailed statement. What he had read and heard was merely that defendant had killed deceased about a settlement, facts about which there was no dispute. Newspaper statements, to disqualify a juror, must be such as fall within the disqualifying sources of information, and purport to be detailed by those who professed to know the facts. Any other statement would only amount to rumor, and it can only be rumor, whether in parol or printed. If the opinion of the juror was founded on rumor alone, then the case falls exactly within the ruling of *Conatser v. State*.

Upon the motion for a new trial, the affidavit of one Davidson was offered to prove that on the day on which the criminal court met, and the defendant's

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case was set for trial, the affiant had a conversation with W. J. Stringfellow, one of the jurors who tried the case. Stringfellow and one Garland, who were both summoned as jurors in the defendant's case, had stopped on their way to the city at a blacksmith shop to have a horse shod. Davidson says that he had a conversation with Stringfellow while at the blacksmith shop, in which affiant said to Stringfellow that it was a very bad time for a farmer to be summoned to serve on a jury, and Stringfellow replied: "They ought to have hung him at first and saved us the trouble." Upon his examination in open court Davidson repeated the conversation, and stated further, "that Lee Garland was with said Stringfellow, and heard all the conversation." Stringfellow and Garland both positively denied that Stringfellow made any such remark to Davidson.

The general rule is, as we have seen above, that loose impressions and conversations of a juror as to the guilt or innocence of the prisoner, founded upon rumor, would not, if disclosed by him or others to the court when the jury is selected, have the effect to render him incompetent; and, *a fortiori*, if disclosed after verdict, would not be a cause for a new trial: *Howerton v. State*, Meigs, 262. The fact that the juror was selected raises a presumption of competency, to overthrow which a clear case must be made out. Having been selected by the defendant himself, a stronger case must be shown against him after trial than would have been necessary to set him aside before selection: *Mann v. State*, 3 Head, 373.

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Great weight must, moreover, be given to the ruling of the trial judge, for the same reason that the like weight is given to his rulings on the competency of a juror when the jury was selected, for he has the witnesses before him, sees their manner and mode of expression, and is better prepared to weigh their testimony than we who see it only on paper: *Johnson v. State*, 11 Lea, 47. The juror himself is, moreover, a competent witness to deny or explain the charge against him: *Rader v. State*, 5 Lea, 610. The juror and his companion, who, as Davidson admits, was present, and heard his conversation with the juror, having both denied the charge, and the trial judge having found against the charge, there is clearly no error in the ruling complained of.

After the trial judge had delivered his charge to the jury, the defendant's counsel requested him to make the following additional charge: "If the jury believe from the evidence that the defendant, at the time of the killing, was insane, or was laboring under the disease of *mania-a-potu*, produced by the use of intoxicating liquors, then he should be acquitted." The judge declined the request upon the ground that it had already been substantially charged. And it is conceded that the charge is full upon the subject of insanity arising from any cause. It is also full upon the effect of the use of intoxicating liquors upon the grade of a homicidal offense, as settled by our decisions. It is conceded that in view of the judge's charge on the subject of insanity, "possibly nothing else might be necessary." But it seems to be thought

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that because of the charge upon the effect of the use of intoxicating liquors, which it was plainly the judge's duty to give, he ought to have said something about *mania-a-potu*, because *mania-a-potu* was mentioned by the medical witnesses. But if there had been insanity from that cause, the charge did include it, and if there was no insanity the charge was correct on the subject of the use of intoxicating liquors. And besides, there was not a particle of proof to show that the defendant was, at the time of the killing, laboring under any such disease.

The defense relied on below on the merits, and again insisted upon in this court, was that of insanity. The jury having found that the defendant was not insane, and the trial judge having refused a new trial, the burden is upon the defendant in this court to show that there is a preponderance of evidence in favor of the defense. We regret to say that, upon full argument and a careful examination of the testimony, the preponderance is the other way. Up to the day of the killing, the defendant transacted business, traded and was traded with, and mixed in social intercourse with his neighbors and the community, as a sane man. Many of his friends who had known him for many years, and met him frequently, say that the idea of his being insane never crossed their minds. For several years the defendant had been given to the use of intoxicating beverages in large quantities, often to excess. When drunk, to use the language of the witnesses, he would act like other drunken men. Nearly all the incidents relied on to show insanity,

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being isolated instances scattered through several years, may be attributed to the temporary folly produced by excessive drink. And all of the more continuous acts, such as talking and laughing to himself, absent-mindedness, and insomnia, the physicians agree, are not necessarily signs of insanity. The leading physician introduced by the defendant testifies that he often talks to himself. The hypothetical case put to the medical witnesses, made up of the isolated incidents above mentioned, grouped together without any of the testimony on the other side, amounts to nothing. The best evidence of which is that two of the three physicians to whom the case is put, from their own knowledge testify, that the defendant, in their opinion, was not insane.

There is no error in the judgment, and it must be affirmed.

The prisoner is an old man, whose three-score years and ten will be completed next month. The record shows that during this long life, up to the commission of the offense for which he stands convicted, he was a good citizen, of unblemished character, remarkable for his kindly and peaceable disposition. He was for years a man in active business, a merchant and banker, and in easy circumstances. Of late years he has been reduced to poverty, supporting himself and family by conducting a market garden. No doubt age and unusual and exacting labor have weakened his naturally strong mental faculties. Under these circumstances, and in view, especially of his age and character shown by the record, we think this is a

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proper case to make, and do hereby make a certificate to the Governor of the State, under the Code, section 5259, which will be entered on the minutes of the court, that in our opinion there are extenuating circumstances attending the case, and that the punishment ought to be commuted.

Judgment affirmed.

W. B. PEPPER v. W. C. SMITH, *et al.*

1. **TAXING DISTRICTS.** *Second class. Organization.* Under the act of 1881, ch. 127, (new Code, sec. 1,677 *et seq.*), the population and territory of a town, whose charter has been repealed, may be organized into a taxing district, by the appointment of commissioners by the county court, upon the petition of a majority of the voters of the district, at the time the petition is filed, whether they were voters at the time of the repeal or not, the majority being ascertained by the vote of the last municipal election, as provided by the act.
2. **SAME.** *Same. Motive of petitioners.* The motives of one of the petitioners for the organization of the taxing district could not affect the rights of the other petitioners, if a majority of the voters, nor can the motives of any of the petitioners be inquired into under a bill filed to contest the legality of the organization, nor his character be impeached, and the chancellor properly excluded all such evidence as irrelevant.
3. **SAME.** *Same. Act of 1885 construed.* The act of 1885, ch. 82, amending the act of 1881, does not disclose any different legislative intent as to the petitioning voters, even if the subsequent legislation could affect rights already acquired under the previous organization.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

JNO. T. ALLEN for complainant.

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N. SMITHSON for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed to contest the legal organization of the taxing district of Lynnville. The chancellor, upon final hearing, dismissed the bill, and the complainants appealed.

Lynnville being an incorporated town, its charter was repealed by the Legislature by an act approved on March 29, 1883. The Legislature had, by the previous act of 1881, ch., 127, (new Code, sec. 1,677 *et seq.*), provided that the several towns, cities or communities in the State, whose population does not exceed thirty thousand, and whose charters of incorporation had been repealed, or might thereafter be repealed, "are hereby created taxing districts, to be styled taxing districts of the second class, in order to provide the means of local government for the peace, safety and general welfare of the people thereof." It is then provided that the government of each of said taxing districts should be vested in a board of three commissioners, to be appointed by the chairman of the county court, in open court, who shall hold office for two years, and until their successors are elected by the qualified voters in the district, and qualified. Then follows this provision: "On the petition of a majority of the voters within the limits of any such town or city, at the time of the repeal or surrender of its charter to the county court, said court shall appoint the three commissioners for the government of said town or city. To ascertain whether a ma-

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jority of the voters have petitioned, the number of votes cast at the last municipal election preceding the abrogation of the charter, shall be taken as the number of legal voters within the territory." The act undertakes to levy the annual tax for municipal purposes, and contains a number of other provisions not necessary to be noticed.

On March 19, 1884, a petition was presented to the county court for the appointment of commissioners to govern the taxing district of Lynnville, and on the next day commissioners were appointed by the court, who qualified by taking the oath and giving the bond required by the statute, and entered upon the discharge of their duties. The present bill was filed on April 14, 1884, by eighteen persons, as owners of property and voters within the limits of the taxing district, against the commissioners, to have the organization of the district declared void, and to perpetually enjoin the defendants from continuing to act officially.

The first and main point relied upon by the complainants to sustain their bill, is that the proper number of voters did not join in the petition to the county court. It is agreed by the parties that the number of votes cast at the last municipal election preceding the repeal of the charter was forty-five. It is further agreed that at least thirty of the petitioners to the county court were qualified voters within the limits of the district at the time of the filing of the petition, only nineteen of the thirty being also voters at the time of the repeal of the charter. And the

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contention of the complainants is that the statute requires a majority of the voters at the time of the repeal. This depends upon the construction of the language of the taxing district act. That language is: "On the petition (to the county court) of a majority of the voters within the limits of any such town or city at the time of the repeal or surrender of the *charter*." The argument is that the words "at the time of the repeal" qualify the word "voters," and limit the right of petition to those persons who were then voters. But the rule of construction of English composition is to apply qualifying words to the immediate, and not the remote antecedent, unless otherwise imperatively required by the context. According to this rule, the words in question merely define the limits of the town within which the petitioning voter must be a voter. If, moreover, you apply the qualifying words to the voters, then you have nothing to define the limits of the town or city. And it may well be asked what limits? For there is, then, no town or city. The plain meaning, we think, is that the petitioners must be voters at the time of the petition within the limits of the corporation at the repeal of the charter. And this conclusion is rendered more certain by the fact that the act is a continuing act, authorizing an application to be made at any time after the repeal, whenever the majority of the voters should see proper to re-organize a new corporation, notwithstanding any changes which might in the meantime occur among the voters.

It is next insisted that the petition does not show

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that the petitioners were a majority of the legal voters in the district. If this objection means anything more than the point we have already considered, as it probably does not, it is not well taken in point of fact. For the petition expressly states that the number of votes cast at the election next preceding the repeal of the charter was forty-five, that twenty-three would be a majority thereof, and that each and all of the petitioners, being more than thirty in number, is and are legal voters within the boundary, which is given, of the late corporation.

The only other error relied on is in the action of the chancellor excluding certain evidence as irrelevant, and deciding the case accordingly. The bill, instead of confining itself to the real issue touching the validity of the organization of the taxing district, undertook to attack the motives of the petitioner who seems to have been most active in organizing the corporation, and to impugn his character. The gravamen of this part of the bill was that the main object of the particular petitioner was to enable him to open a drinking saloon within four miles of an incorporated institution of learning. But the private motives of one petitioner could not affect the legal rights of the other twenty-nine. And besides, nothing is better settled than that it is no defense to a legal right, asserted in the mode prescribed by law, that the party is actuated by improper motives, for the obvious reason that the effect would be, were the law otherwise, to turn nearly every suit into a wrangle over motives, and the courts into arenas of mutual recrimina-

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tion and invective: *Payne v. Railroad Co.*, 13 Lea, 525; *Macey v. Childress*, 2 Tenn. Ch., 442, and cases there cited. See also *Kiff v. Youmans*, 86 N. Y., 324; *Davis v. Flagg*, 35 N. J. Eq., 491.

The Legislature has the power to incorporate municipal corporations without previously consulting the corporators, and may, of course, prescribe the mode in which the organization of such a corporation shall be effected under the general law. We have held in two cases at Knoxville that municipal corporations might be legally organized in the mode prescribed by the act under consideration if rightfully pursued.

The Legislature, on April 4, 1885, amended the act of 1881, ch., 127, among other things, by requiring the commissioners, after their appointment by the county court, to hold a popular election "to ascertain whether a majority of the legal voters within the boundaries of such district" desire the organization of the corporation. The act then provides that the election shall be held within the boundaries of the district in the manner, and subject to the laws of elections for county officers, and prescribes the form in which the voters shall express their wishes. And adds, in the same sentence, "that the legal voters of the said election shall be the same that were legal voters at the time of the abolition of the former charter." It is suggested that this clause is a legislative recognition of the construction of the former act as contended for by the complainants, namely, that the voters at the time of the repeal of the former charter should alone have a voice in the reorganization of the corporation.

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If the new act had clearly disclosed a legislative intent as contended for, it would be entitled to great weight. For, although a legislative construction of a former act is not binding on the courts, and although corporate rights acquired in 1884 could scarcely be affected by subsequent legislation not intended to affect those rights, yet it would be strongly persuasive as to the meaning of the words used. But it will be noticed that the act of 1885 expressly directs the election to be held "to ascertain whether a majority of the legal voters within the boundaries of such district" desire the organization, plainly meaning the legal voters at the date of the election. And the subsequent clause merely provides that the legal voters shall be the same as the legal voters at the repeal of the charter, that is the voters within the district shall have the same qualifications as the old voters were required to have in order to entitle them to vote. It does not mean that they shall be the same individuals, but they shall possess the same qualifications.

There is no error in the decree of the chancellor, and it will be affirmed with costs. If any decree has been heretofore entered to the contrary, it will be set aside and annulled.

TURNEY, J., delivered the following dissenting opinion:

The bill in this case was filed by a number of citizens of Giles county, residents of Lynnvile Station, against the defendants, who claim to be commis-

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sioners of Lynnville taxing district, enjoining them from the exercise of the powers, duties and functions of commissioners, charging that the attempted organization of a taxing district was in violation of, and a fraud upon, the law, and for the purpose of enabling the movers to sell spirituous and intoxicating liquors within four miles of a chartered institution of learning. The proof clearly shows that the object of the principle actors, was to enable themselves to engage in tippling, which they at once began to do.

Lynnville academy is a chartered institution since July 28, 1881, and within one mile of Lynnville Station.

In 1883, the General Assembly repealed the charter of Lynnville Station. On March 19, 1884, one year less ten days after the repeal of said charter, a petition was presented to the chairman of the county court, to have him appoint three commissioners to organize a taxing district for the town of Lynnville. The petition had the signatures of thirty-three names. At the last municipal election had before the repeal of the charter, forty-five votes were cast, and sixty-eight persons entitled to vote. It is agreed, that of the petitioners only nineteen were living within the corporate limits at the last municipal election, and that fourteen did not, and were not entitled to vote in said election; that thirty were living within the limits of the town at the time the petition was filed, and the others outside.

It is argued that Gordon & Angus set it on foot and employed counsel to file the petition, and that their object was to sell whisky in the town.

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The act of 1881, chapter 127, New Code, 1677, 1678, 1679, provides: "The several towns, cities or communities in this State, whose population does not exceed thirty thousand, and whose charters of incorporation have been repealed, or shall hereafter be repealed, abolished, or in any manner become extinct, are hereby created taxing districts of the second-class," etc.

"The government of said several taxing districts of the second-class, shall be vested in a board of three commissioners for each district, to be appointed by the chairman of the county court, in open court," etc.

"On the petition of a majority of the voters within the limits of any such town or city at the time of the repeal or surrender of its charter to the county court, said court shall appoint the three commissioners for the government of said town or city," etc. The number of votes cast at the last municipal election before repeal, to be taken as the number of legal voters in the territory.

Was the proceeding in the county court pursuant to this law? Were the petitioners constituted of voters defined by it? Did such a majority as the act contemplates petition? It has been seen that forty-five votes were the number cast at the last municipal election, but that of these only nineteen signed the petition.

Was it intended by the Legislature that the persons who abolished the charter should organize a taxing district, or did it intend that new comers, making a majority of the number of votes cast, should control?

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There is no difficulty in reaching the meaning of the Legislature if we give to its language its plain, literal, unambiguous and common significance. It is "*a majority of the voters within the limits of the town at the time of the repeal or surrender of its charter.*" Can this be tortured to mean that twenty-three men, who lived in another State at the time of the repeal, may move within the limits, remain long enough to be voters under the law, and then petition and have the taxing district organized, taking no account whatever of the forty-five voters who were within the limits at the time of repeal, and voted at the last election, or of the twenty-three who did not vote?

Does it mean twenty-three boys, living in the same civil district of the county, and becoming of age after the repeal, may move into the town and organize a taxing district against the will of sixty-eight older voters and citizens? Such legislation would contravene public policy, and tend to subvert the principles of our form of government.

Both questions must be answered affirmatively, unless we give to the language of the act its plain and common sense meaning; for, if we may say that fourteen new comers may add themselves to nineteen of the original corporators and make the organization, we may, for the like reason, say that if one of the original voters desires the organization, he may induce twenty-two strangers to come within the limits and with him control the sixty-seven who do not desire a municipal government.

If strangers may work such changes in one year

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after the *abrogation* of a charter, why may they not five or twenty years after?

The institution of learning is claimed to be an excellent one, such as is usually likely to induce parents to move to it that their children may have its benefits. Suppose, in this case, a hundred fathers had moved with their children to the town of Lynnville Station and procured homes, would it then be a correct holding to say that the Legislature intended by its enactment to put it in the power of nineteen citizens, added to fourteen strangers, to change the plan of government without the consent of the original forty-nine voters and the one hundred new ones? Certainly there is no warrant in our constitution for such adjudication or legislation.

Did the Legislature mean to pull down rather than build up? We must so hold, if we construe the act to mean that twenty-three men, come whence they may, shall rule in this case.

It is apparent that a majority of the sixty-eight voters within the limits at the time of the repeal, and of the forty-five who voted at the last election, did not want the organization. The record shows that energetic efforts were made to procure names to the petition, and we are compelled to infer that those whose names do not appear to the petition, had the opportunity and refused to sign.

Taking the law as an entirety, it is evident the Legislature meant to have the dissolution of one form of government and the substitution of another as nearly one act as it was possible. It makes the

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dissolved corporation a taxing district, and at the same time provides for its organization. It contemplates reasonably prompt actions on the part of the then voters of the district. Failing of this, they are remitted to the law for the formation of municipal corporations (M. & V. Code, sec. 1575 *et seq.*), or will remain an unincorporated community. I doubt the constitutionality of that part of the taxing district law already cited, fixing the mode of ascertaining the majority. This case presents the exact illustration of my objection. Here was a municipal corporation, with a voting population of sixty-eight; at its last election forty-five voted and twenty-three failed to vote. Under this statute the forty-five who voted are at the mercy of the twenty-three. The forty-five may desire to have no municipal form of government that their schools may be protected by the four mile law, as it is called. The twenty-three may prefer the liquor traffic to the schools. They are the majority under the act; still they are but one more in number than one-third of the voting population, with statutory authority to organize a corporation against the will of the two-thirds. There is no *republicanism* in this. The forty-five who vote are disfranchised because the twenty-three did not, and it might be that the twenty-three failed to vote on purpose to get such advantage. To make the case the more applicable, if this proceeding is *held* good, we then have thirty voters disfranchising fifty-two, and dictating their form of government, imposing taxes, etc. There were eighty-two voters within the territory when the petition was filed.

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The Legislature has no authority or power to disfranchise except for crime, and then only through the judgments of the courts.

By rejecting the clause limiting the petitioners to a majority of those last voting, we have a law free from constitutional objection and preserving the equality of the citizen, giving to each a voice in the form of municipal government.

Reverse the decree and make the injunction perpetual.

Upon petition to rehear, TURNER, J., said:

It is conceded by the entire court that the language of the act, literally taken, means what is claimed for it in the opinion delivered on a former day of the term, but argued that it was not the intention of the Legislature to give it the circumscribed operation its language imports. Let us see whether such is the fact. That part of the act before us is in the eleventh section of the act of 1881, passed April 1, and is as follows: "On the petition of a majority of *the voters within the limits* of any such town or city, at *the time of the repeal* or surrender of its charter to the county court, said court shall appoint three commissioners for the government of said town or city. To ascertain whether a majority of the voters have petitioned, the number of votes cast at the last municipal election preceding the abrogation of the charter shall be taken as the number of legal voters within the territory."

It is argued the clause last quoted shows it to

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have been the purpose of the Legislature to allow any voter who might be within the limits at the time of presenting the petition, to make one of the number constituting a majority of the votes cast at the last election.

To the contrary, I think it clearly means the reverse. We must construe this and the preceding clause together. The term "a majority of *the voters* in the second clause does refer to the "majority of the voters within the limits," in the first clause, etc. Construing them together, they will read: When a majority of the voters, within the limits, etc., at the time of repeal or surrender, etc., shall petition, etc.

The character and qualifications of voters being defined in the first, the language of the second clause must be understood to refer to it, as declaring out of what voters the majority shall be obtained.

This section was amended by the tenth section of the act of 1885, chapter 82, pamphlet acts, page 162, as follows: Providing for "notice of time and place of election to ascertain whether *a majority of the legal voters within the boundaries of such district* desire the organization of the same, at which time and place said commissioners shall open and hold an election," etc.

"Those in favor of the organization of such district, shall have written or printed on their tickets the words 'for the taxing district,' and those opposed to the organization of such district, the words 'no taxing district.' That *the legal voters* of said election *shall be the same that were legal voters at the time of the abolition of the former charter,*" etc.

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Thus we have one Legislature saying the petition shall be "of a majority of *the voters within the limits at the time of the repeal or surrender of the charter,*" and the amendatory act saying, "that *the legal voters of said election shall be the same that were legal voters at the time of the abolition.*"

We then inquire into the purpose of the amendment and its extent. It is too plain for argument that the object was to make the question of having a taxing district elective, and at the same time give to the voters who had abolished one form of government the right to establish another by the votes of those who had been entitled to vote under the former charter. The latter purpose was to do away with the restriction, by the first act, of legal voters to a majority of those who had voted at the last election, and give the right to all who were entitled to vote at the time the charter was surrendered, whether they had or had not voted at the last municipal election, both intending (as suggested in the first opinion) that the abolition of one government and the establishment of another should be as nearly simultaneous as possible. Both Legislatures are legislating for the same communities, viz.: Voters within defined limits at the times respectively designated in their acts, the only difference being in their modes of ascertaining who those voters were. Upon the fact of being voters within prescribed territorial boundaries, at specified anterior periods of time, there is no difference. The amendatory act extends the elective franchise to a later day and larger population, but does not inter-

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fere with the original act in its local restrictions; on the contrary, expressly retains them in the plainest and most comprehensive words. It is apparent the Legislature of 1885 understood the language of the one of 1881 to be restrictive, both as to places and persons. It allows that as to place not only to stand but repeats it, and enlarges as to persons. Both acted upon the idea that it was proper policy to confine the voters in the effort to establish a taxing district to those who had held but surrendered another form of municipal government.

The original law had been accepted with the understanding of its restriction for four years. Its policy had of course been considered until a second legislative body determined to amend it partially.

The latter act is a construction by the law-making power of the language of the first. By its retention of the restriction now complained of, we see its policy. Whether the policy of a law is wise or unwise, does not concern the courts. If the Legislature had authority to pass it, and did so, it is our duty to enforce it, and not construe it to meet our views of what the law ought to be. If we hold the Legislature did not intend what it said in the first act, we must of course hold it did not mean it in the second, and this, it seems to me, would be rather a bold undertaking against two Legislatures, composed, in part, of some of the ablest lawyers in the State. It would be remarkably strange, indeed, that two Legislatures, speaking four years apart, and acting upon the same idea of popular government,

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attempting to legislate upon the same subject, for the same communities, and composed respectively of different representatives of the people, largely interspersed with sound and painstaking lawyers, should so far misunderstand simple and common place expressions as to employ language almost identical in the original and amendatory acts, and still intend a meaning the exact reverse of the words employed. The presumption is certainly in favor of their understanding of the terms used.

To put it beyond doubt that the Legislature of 1885 did understand the language of the Legislature of 1881, in its literal and restrictive sense, a reference to the eighth section of their act is, in my opinion, sufficient. In that, in providing for the abolition of taxing districts, they enact that upon a petition presented to them, signed by two-thirds of the legal voters of the district asking for it, the commissioners shall abolish their taxing district by resigning, etc. There are no restrictive words in this section, so gives the right to every legal voter who may be such at the time of petition, without regard to whether he was so at any time before. Limitation and restriction are purposely avoided in this instance, and purposely placed in the other. A Legislature incapable of construing, is certainly incompetent to amend an act. Legislative constructions are certainly as high authority as many of the law writers we cite daily.

During the four years of the original act, this is the first and only case arising in which it was insisted the law meant other than is expressed in its clear, simple

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terms. The people, the bar and the several Legislatures have thought of the statute in no other light than appears on its face, and after their experience of the four years of its workings, it is simply modified, as already indicated. It is dangerous to be wise beyond what is written in the statute.

To explain away clear expressions of legislative will, is to make a disturbing and troublesome precedent. It is to hold, in effect, that no legislative act is a guide for the conduct of the citizen before it has passed through the construction processes of the courts.

If, as conceded by the majority, the language of the act means what I claim it means, but, as they argue does not convey the intention of the Legislature, I ask what language could it have used to convey such intention if it had so desired? How are we to know the purpose of that co-ordinate department, except by its language?

Our only safe rule is to declare the law as we find it written, unless it violates the constitution. That it may seem to us foolish or impolitic, should give us, as a court, no concern. That it may seem absurd in its application and administration, is not a matter for our consideration, but for that of the people, through the Legislature.

While I entertain a profound respect for the opinion of the majority, it has failed to create in my mind the slightest doubt of the correctness of my construction, and I adhere to the opinion first delivered, and file it as part of this dissenting opinion.

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EVANS, FITE, PORTER & CO. v. VIRGINIA BELL,
Executrix.

1. PLEADINGS AND PRACTICE. *Compromise of debts.* If a creditor, under a compromise arrangement with other creditors and the debtor, accept part of his demand in full of the whole, the claim to the remainder is extinguished, and such unpaid part will neither sustain a suit nor form a sufficient consideration for a new promise by note.
2. SAME. *Same.* Such a note cannot be sustained upon the ground that it was given to avoid litigation, when the proof shows that the party to whom it was given had taken no step to commence litigation, nor made any threat to that effect, although another creditor had prepared a bill by himself alone, against the debtor alone, apparently with the intention of filing it.
3. SAME. *Same. Fraud.* No one or more creditors to a composition arrangement by all the creditors with a common debtor can, upon the pretense or ground of fraud on the part of the debtor in the settlement, secure a benefit to himself, at any rate without proof of fraud sufficient to set aside the composition as to all the creditors, and then only, perhaps, by setting aside the composition releases by proper proceedings.

FROM ROBERTSON.

Appeal in error from the Circuit Court of Robertson county. JQ. C. STARK, J.

H. E. JONES for complainants.

JNO. E. & E. A. GARNER and J. W. JUDD for defendant.

COOPER, J., delivered the opinion of the court.

J. L. Bell, the testator of the defendant, Virginia Bell, being a merchant at Springfield, became indebted

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to the plaintiffs, and other wholesale merchants at Nashville, Louisville and Cincinnati to the amount of nearly thirteen thousand dollars. Being so indebted he conveyed to his brother-in-law his store-house and stock of goods, together with his books and accounts, on March 14, 1877, in trust to secure his creditors ratably. On the 16th of the same month, he conveyed to the same trustee, for like purpose, his dwelling house and lot. Upon examination by one of the members of the plaintiffs' firm, and by other creditors, of the property thus conveyed in trust, the creditors proposed to take fifty cents in the dollar in full of their claims, the plaintiffs proposing to procure the necessary releases from all the creditors upon payment of the money. The trustee raised and paid to the plaintiffs the required amount, and releases in full were obtained by complainants from all of the creditors. The trustee procured \$1,000 from the sale of the trust assets, advanced himself \$250, and obtained the residue, \$5,000, from Bell. The money was paid and the releases obtained in a month or two after the execution of the deeds of trust. On January 24, 1878, Bell gave to the plaintiffs his note, 'being the note sued on, at twelve months, for the one-half of the unpaid part of the released debt. Bell died May, 19, 1879, leaving a will by which the defendant was appointed his executrix. This suit was brought against her as executrix on the note thus given. The defense relied upon was the want of consideration.

The case was tried by the circuit judge without a jury. The plaintiffs contended that the unpaid part

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of the released debt was a sufficient consideration for the new note, and further that the note was given to prevent threatened litigation to set aside the composition on the ground of fraud. The circuit judge found generally both the law and the facts in favor of the defendant. He found specially that there was no fraud committed by the defendant's testator in procuring the settlement with his creditors of their debts at fifty cents on the dollar; that there was no threatened litigation upon the part of the plaintiffs against defendant's testator at the time of the execution of the note sued on, and that said note was not executed to avoid litigation; that the note was executed for one-half of the balance of the original debt after the payment to plaintiffs of fifty cents on the dollar of the whole, which debt was released in consideration of such payment; and, finally, that as matter of law, the released debt was not a sufficient consideration to sustain the note.

Upon the appeal in error of the plaintiffs, the Referees report in favor of the finding of the circuit judge upon the law, but recommend a reversal on the facts. The defendant has excepted to the conclusions of fact found by the Referees.

The chancellor and the Referees are right in holding that a debt released upon an accord and satisfaction by a composition assented to by all the creditors is extinguished, and can neither sustain a suit nor form the consideration of a new promise. If a creditor, says Mr. Chitty, under a composition arrangement with other creditors and the debtor, accept part

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of the demand in full for the whole demand, the claim to the remainder is in law extinguished, although there be not any release by deed, because it would be a fraud upon other creditors to seek to enforce the payment of the balance. Chit. on Con., 687, 776. And our statutes work the same result by providing that releases shall have effect according to the intention of parties thereto, and that all settlements in writing for the composition of debts shall be taken as evidence, and held to operate according to the intention of the parties, although no release under seal is given: New Code, secs. 4538, 4539. Of course, if a debt is once extinguished by the voluntary act of the party, it cannot be revived without a new consideration. It is otherwise where the remedy is lost, as by the bar of the statute of limitations, or a discharge in bankruptcy, leaving the debt itself unaffected. A moral obligation alone is not a sufficient consideration to sustain a promise: *Bates v. Watson*, 1 Sneed, 376. It has accordingly been held, both in England and America, that a note given for part of a debt voluntarily released upon a composition, is, without more, *nudum pactum*, and will not sustain an action: *Ex parte Hall*, 1 Deacon, 171; *Stafford v. Bacon*, 1 Hill, 532; *Warren v. Whitney*, 24 Me., 561; *Montgomery v. Lampton*, 3 Met. (Ky.), 519. And the law is so laid down in 1 Pars. Con., 381, note. Mr. Daniel, in his able work on Negotiable Instruments, says, in sec. 182, "that a note executed for the payment of a debt discharged in bankruptcy, or barred by the statute of limitations, or voluntarily released, would be

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good." Precisely what he means by "voluntarily released," is not explained. He cites in support of that part of the section, *Stafford v. Bacon*, 25 Wend., 384; *Valentine v. Foster*, 1 Metc., 120; *Sneveley v. Read*, 9 Watts, 396. The first of these cases, as we learn from the same case, 2 Hill, 353, was only the opinion of the chief justice of the court, erroneously printed by the reporter as the opinion of the court, when the opinion of the court, which was finally concurred in by the chief justice himself, was exactly to the contrary, as reported in 1 Hill, 532. In the second case cited by Mr. Daniel, the Supreme Judicial Court of Massachusetts refused to sustain an action, based on a new promise to pay a debt released to qualify the debtor to become a witness. In the third case, the Supreme Court of Pennsylvania held that a debt in judgment was extinguished by arresting the debtor by a *ca. sa.*, and would not sustain a new promise; and this case virtually overrules the earlier case of *Willing v. Peters*, 12 Ser. & R., 177, which seems to be the only case tending to support the contention of the plaintiffs.

The trustee proves in this case that \$5,000 of the money used by him in compromising the debts were paid to him by Bell, and there is no proof where Bell obtained the money. Manier, of the firm of Pigue, Manier & Co., one of the Nashville firms who joined in the composition, proves that his firm obtained information (not stated) that Bell had practiced a fraud in obtaining a release, and caused a bill to be prepared in their name alone, against Bell alone,

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to set aside the release, and be restored to their rights as if no such release had been executed; that he and Porter, one of the plaintiffs, went to Springfield to file the bill or effect a settlement; that Porter alone saw and conversed with Bell, witness not being present, the result being that Bell handed him a note for one-half of the unpaid balance of debt due his firm, and handed to Porter the note now in suit. The defendant, being examined as a witness, deposes that in July, 1878, after Bell's death, she saw Porter, and had a conversation with him about the note in question, in which she stated to him that she knew what the note was given for, and remarked: "Mr. Porter, I had an impression that you were all going to sue Mr. Bell;" and he replied: "No, we did not intend to sue him." Porter himself says, in his answer to the defendant's petition for discovery, that Pigue, Manier & Co. caused a bill to be prepared, and Manier and witness went to Springfield for the purpose of filing it, or having a settlement; that Bell, when these facts were communicated to him, "agreed, in consideration that Pigue, Manier & Co. would not carry the matter into court, to give them his note for one-half of the balance due them, which he did; and, at the same time, gave me the note in question, saying that he would not treat me any worse than he did Pigue, Manier & Co." There is no evidence that plaintiffs ever threatened to sue, or that the note in suit was given in consideration of their promise not to sue. The bill prepared was for the exclusive benefit, and in the sole name of Pigue, Manier & Co.,

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and, it is very clear, that no one else could receive any benefit under it, and that it did not bring before the court the necessary parties to set aside a composition release by a number of creditors. It was manifestly prepared *in terrorem* to secure to two of a large number of creditors an advantage over the others.

Under these circumstances, we cannot say that there is no evidence to sustain the finding of the circuit judge that there was no threatened litigation upon the part of the plaintiffs against defendant's testator at the time of the execution of the note sued on, and that said note was not executed to avoid litigation by them. On the contrary, the evidence is clearly in favor of the findings.

The circuit judge further found that there was no fraud committed by the defendant's testator in procuring the settlement with his creditors. The Referees are of opinion, on the other hand, that the proof is ample to show such fraud. They lay stress, in this connection, on the fact, as they say, that the settlement was made on Bell's representations that he was insolvent, and unable to pay more than fifty cents of his indebtedness. For this they refer to Porter's answer to the petition for discovery already referred to. But that part of the answer was not read by the defendant below, and not being responsive to the interrogatory put could not be read by the plaintiffs. Our statute is that the answer of a party to the petition and interrogatories filed under it is evidence, on the trial of the suit, in the same manner, and

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with the like effect, as an answer to a bill in equity for discovery: New Code, sec. 4,656. And the rule of equity is that an answer not responsive is not evidence for the defendant: *Davis v. Clayton*, 5 Hum., 446; *Alexander v. Wallace*, 10 Yer., 105; *Beach v. Haynes*, 1 Tenn. Ch., 569. The interrogatory put to the plaintiffs in the petition for discovery was merely whether the note sued on was not executed for one-half of the balance of the debt due plaintiffs, which was left after the payment of the fifty per centum. The answer is that it was, and adds: "But the immediate consideration which led to the note was as follows," etc., and then gives a statement which contains the words cited by the Referees. The circuit judge allowed the greater part of the answer to be read, saying that he would consider the evidence for the purpose of seeing if it tended to prove any threatened litigation of Bell by the plaintiffs, as an inducement to the execution of the note. Now, if it be conceded that so much of the answer as related to the consideration of the note as claimed by the plaintiffs was admissible, of which there may be grave doubts, yet surely conversations with Bell in relation to the composition formed no part of the consideration of the note, and were not in any sense responsive to the interrogatory. There is no other proof on the subject in the record. The Referees lay stress also on the fact that Bell paid \$5,000 of the composition money. But, of course, the creditors expected him to pay all the money in some way, and they made no complaint of the source at the time,

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and it does not now appear when or how it was procured. And if, as the trustee proves, the proposition of compromise came from the creditors, without any assertion by Bell as to his pecuniary condition, the mere fact that the money was the money of Bell would not establish fraud. If there had been proof of actual fraud by Bell in obtaining the composition, then the execution of the notes of January 24, 1878, might be looked to as in confession of the fraud, but in the absence of such proof, it would only be evidence of buying his peace. The Referees lay no stress on the fact, and the circuit judge found that there was no fraud.

But the difficulty of the plaintiffs is, that their suit is upon a note based upon an extinguished debt, and without any new consideration, so far as they are concerned. They were the active creditors in arranging the composition, and getting the releases of other creditors. They made common cause with all the creditors who joined in the arrangement, and could not at the time have bargained for any advantage to themselves over the other creditors. Any such agreement, says Mr. Pomeroy, if executory, could not be enforced against the debtor, either in equity or at law, for it would be a fraud on the other creditors: 2 Pom. Eq., sec. 967. They cannot maintain a suit on the unpaid part of the debt, for that too, in the language of Mr. Chitty, quoted above, would be a fraud on the associate creditors. And it is difficult to see how any one creditor, who is a party to the composition, can secure a separate benefit to himself upon the ground of fraud, or alleged fraud, in the compo-

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sition. At any rate, a creditor cannot go back to the original consideration without showing a state of facts which would avoid all the releases, nor then, perhaps, except by filing a bill for the purpose.

The exceptions to the report of the Referees will be sustained, and the judgment of the circuit court affirmed.

15L 578
16L 26

FAYETTEVILLE & COLUMBIA TURNPIKE COMPANY v.
THE STATE.

1. CRIMINAL LAW. *Turnpike company.* The Code, section 4918 (new Code, section 5751), uses the word toll-gate for the road on which the gate is erected, and makes it an indictable offense to fail to keep the road in repair as required by law and the terms of the charter.
2. SAME. *Same.* A turnpike corporation, and its proprietors, may be prosecuted criminally, under the Code, section 4918, for failing to keep the road in proper repair, notwithstanding the provisions of the statute requiring the appointment of superintendents of turnpikes, with power to report upon the condition of the road, and throw open the gates.

FROM LINCOLN.

Appeal in error from the Circuit Court of Lincoln county. J. J. WILLIAMS, J.

W. B. LAMB and J. D. TILLMAN for Turupike Company.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

Appeal in error from a verdict and judgment of con-

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viction for not keeping a turnpike road in proper repair. The indictment contains three counts, one against the turnpike corporation for failing to build a bridge over Backman's creek, across which the turnpike road passes; another count is against the president, secretary, treasurer and directors of the corporation for the same offense; and the third count is against the corporation for not building a culvert or other crossing over a particular ditch across which the road passes. The verdict was general that the defendants were guilty as charged in the indictment.

There was a motion made by the defendants to quash the indictment, upon the ground that it did not contain the necessary averments to constitute the offense charged. We learn from the brief, and argument submitted on behalf of the appellants, as well as from the opinion of the trial judge on the motion to quash, which is copied into the record, that the point of the objection was that an indictment would not lie against the company for a failure to keep its road in repair until the superintendent of turnpikes, required to be appointed by the county court each year by the act of 1877, chapter 101 (new Code, section 1465, *et seq.*), had reported upon the condition of the road. And the position seems to be well taken, if the indictment had been based upon the third section of the act of 1877 (new Code, section 1483). For that section makes the corporation indictable for failing to keep the road in repair "as required by this act, and the report of the county superintendent." But there has been long on the statute book a general law, brought into the

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Code, section 4918 (new Code, section 5751), expressly prohibiting any person or body corporate, privileged by any act of Assembly to open and keep in repair any toll-bridge or toll-gate, to fail or refuse to put and keep the same in repair, "as prescribed by law or in the act of incorporation," and making the failure an indictable offense, punishable by fine. And it was held at an early day, upon the original statutes afterward brought into the Code, that the legislation was binding on the company, notwithstanding cumulative provisions to the same end in the charter: *Simpson v. State*, 10 Yer., 525. The general law must be equally obligatory upon the company, notwithstanding other cumulative provisions looking to the same end. The statute, as brought into the Code, sections 1292 and 4918, and the same language is again adopted by the act of 1877, chapter 101, section 3, new Code, section 1483, uses the word "toll-gate," by a not uncommon figure of speech, for the road on which the gate is allowed to be erected. But the meaning of the Legislature is plain that the road shall be kept in repair. The indictment in this case is for failing to keep the road in repair in the way specified as required by law and the terms of the charter. The charter provides that "the road shall have sufficient ditches and culverts to drain off the water, and safe bridges across streams where bridges are necessary." The preponderance of evidence is in favor of the verdict, and the charge is not excepted to.

Affirm the judgment.

Byram v. McDowell.

MOSES BYRAM v. HENRY McDOWELL *et al.*

1. PLEADINGS AND PRACTICE. *Judgment against non-resident.* By the law of this State a judgment against a non-resident by attachment of property without service of process or publication, as required by statute, is void, and no proof *aliunde* is admissible to show publication, the record itself being silent on the subject.
2. CHANCERY PLEADINGS AND PRACTICE. *Collateral attack on judgment.* A judgment is only collaterally, not directly, impeached by a bill which does not make the judgment-creditor a party, and only proceeds against one of several judgment-defendants.
3. SAME. *Void judgment.* A void judgment cannot be validated as to third persons who have previously acquired antagonistic rights, nor perhaps as to the party himself, although the latter may personally estop himself from contesting rights acquired under it, such estoppel not affecting third persons claiming under him by antecedent act.
4. SURETY. *Contribution.* A surety who pays, as between him and other-sureties, more than his share of the common debt, is entitled to such contribution from the co-sureties as will meet the equity of the case.

FROM SUMNER.

Appeal from the Chancery Court at Gallatin. GEO.
E. SEAY, Ch.

J. J. TURNER and JNO. E. & E. A. GARNER for
complainant.

C. R. & LEE HEAD for defendants.

COOPER, J., delivered the opinion of the court.

On February 12, 1877, John Buntin, as the payee of a promissory note, brought suit in the circuit court of Sumner county against J. C. Buntin, Alfred Graves,

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Henry McDowell, Thomas Graves and Moses Byram, as the makers of said note. A summons issued to Sumner county against all the parties, which was executed on the first three of the above defendants. A counterpart summons issued to Robertson county, and was executed on Moses Byram. The defendant, Thomas Graves, was a non-resident of the State, and upon proper affidavit to this effect, a writ of attachment was issued to Sumner county, and levied upon certain lands as the property of the said Thomas Graves, and a counterpart writ of attachment was issued to Robertson county, which was levied on other land as the property of Thomas Graves. Upon return of these attachments, levied as aforesaid, an order of publication was made by the clerk, and also by the court, but there is no proof in the record that the publication was in fact made, nor do the judgments in the cause recite the fact of publication. On October 27, 1877, a judgment by default was taken against all the parties for \$2547.86 and costs, for which a *fi. fa.* was awarded. An order of sale was also taken to sell the lands of Thomas Graves attached in Sumner county. On July 9, 1878, another judgment was rendered for the sale of the land attached in Robertson county, reciting the former judgment, and that judgment was pronounced upon the attachment writs, but was only entered as to the land attached in Sumner county, and ordering the entry to be made *nunc pro tunc*. On July 1, 1878, Byram and McDowell each paid upon the execution issued on this judgment, one-third of the amount due, and on October 26,

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1878, Byram paid the remaining third. As between the makers of the note, J. C. Buntin and Alfred Graves were principals, and Byram, McDowell and Thomas Graves sureties. The principals having become insolvent, the sureties were compelled to pay the debt.

On November 27, 1878, the present bill was filed by Moses Byram against Henry McDowell, Thomas Graves and Wilson N. Wright. The object of the bill was primarily to subrogate the complainant to the rights of John Buntin, the judgment-creditor, under his attachments in the suit at law of the property of Thomas Graves, and to enforce the same to the extent of the one-third of the debt to which Thomas Graves was liable, by way of contribution as between the sureties, and if this could not be done, then for contribution between the sureties, so as to equalize the burden. Graves and McDowell allowed the bill to be taken for confessed against them. Wright was made a defendant, because on April 6, 1877, Thomas Graves had conveyed to him in trust to secure his creditors, including McDowell and Byram as his co-sureties on the Buntin note, all his lands in Sumner and Robertson counties, being the lands attached in the Buntin suit. This deed was noted for registration in Robertson county on the day of its execution, and in Sumner county three days thereafter. The bill claimed that the attachment liens, to which the complainant asked to be subrogated, were superior to the rights of the trustee under the trust assignments, the attachments having been levied

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on 17th and 21st of February, 1877. It turned out that the defendant, Wright, had declined to execute the trust, and John Y. Hutchison was appointed trustee in his place. By consent of complainant, Hutchison was permitted to come in as defendant instead of Wright, and answer the bill. He filed his answer as a cross-bill, attacking the validity of the attachment proceedings, but made no person a defendant thereto except the complainant, Byram. The bill could not, therefore, be treated as directly impeaching the attachment proceedings, for want of the necessary parties. The chancellor, on final hearing, subrogated the original complainant to the attachment liens, and ordered the land sold for Graves' proportion of the debt. Upon the appeal of Hutchison, the Referees report in favor of affirming the chancellor's decree, and the appellant has excepted.

The first exception is, that there was no publication in the attachment suit at law for the defendant, Thomas Graves, and that the judgment against him was, therefore, void, the Referees being in error in holding otherwise. The Code, after giving directions as to the mode of proceeding in attachment cases, says, section 3524: "The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed, upon return of the attachment duly levied, as if the suit had been commenced by summons." In those States in which attachment suits are treated as proceedings *in rem*, the levy of the attachment has been held to bring the party into court, and in the absence of any thing

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showing the contrary, the presumption in favor of the regularity of the proceedings of a court of general jurisdiction has been held sufficient to support the judgment without any thing to show publication: Drake on Attach., sec. 447; Freeman on Judg., sec. 126. The rule is otherwise in those States in which, as in our State, the suit by attachment of property is held to be *in personam*, the attachment being only to impound the property to meet the judgment. Our courts have, therefore, invariably held that publication is essential to bring a non-resident defendant into court. And it has been expressly ruled that a judgment at law in a suit commenced by summons, and also by an original attachment sued out at the same time, is void when it appears that the summons was returned not found, and when the record fails to show, either by evidence embraced therein, or by an entry on the docket or minute book, or by a recital in the judgment, that publication had been made under the attachment in accordance with the requirements of the statute: *Bains v. Perry*, 1 Lea, 37. That is exactly the case before us. And proof *aliunde* is inadmissible, either to supply omissions or to contradict a record. The record is the best and only competent evidence of its contents: *Jones v. Hollingsworth*, 10 Heis., 653; *Brown v. Wright*, 4 Yer., 57; *Walker v. Cottrell*, 6 Baxt., 257.

The Referees find that Thomas Graves is estopped to deny the validity of the judgment in the attachment suit, because he appeared in said court in said cause and recovered a judgment by motion against

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the principals on the note. The defendant, Hutchison, excepts to this finding of fact. The conclusion of the Referees rests on the ground that in the transcript of the suit at law there is, under the heading of the case, what purports to be a judgment by motion, rendered on November 16, 1877, in favor of McDowell, Byram and Thomas Graves against James C. Buntin as one of the principals on the note. The supposed judgment omits to state any amount of recovery, and is probably fatally defective. But the heading of the judgment with the style of the original case was, of course, a mistake. The motion by sureties against their principal is an independent action, which, although it may be made in the court in which the judgment was rendered, may also be made in any court having jurisdiction of the amount, or in the county of the defendant's residence: Code, secs. 3589, 3632. Graves did not, therefore, appear in the attachment cause, and he positively denies in his deposition that he had any thing to do with the motion, or any knowledge of it. There is proof that on July 1, 1878, he was with McDowell and Byram at the office of the lawyer of John Buntin, the judgment-plaintiff, at which time he sought to have an execution issued on the original judgment against James C. Buntin, one of the principals, and agreed to share in the costs of a suit which McDowell had already commenced in the chancery court against James C. Buntin, seeking to reach certain property as the property of Buntin for the satisfaction of the debt. At this interview, both McDowell

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and Byram think, the judgment by motion was talked about, but their testimony is very meager and unsatisfactory on the point, being so mixed up with what was said about McDowell's chancery suit that the witnesses may well have confounded the two. The motion was, it will be remembered, made November 16, 1877, and the conversation at the lawyer's office in July, 1878. There is no proof that Graves authorized the motion to be made, or knew about it before that interview, and the manner in which both Byram and McDowell are interrogated on the subject fairly implies that he did not. Byram is asked whether at the lawyer's office any thing was said by Graves, in his presence, about the judgment by motion. He remembers the meeting, and that he and Graves agreed to go in with McDowell in his bill, but does not answer the question about the motion. All that he says is: "We were equal in obtaining the judgment against J. C. Buntin," which simply means, in view of the question, that all their names were used in it. McDowell is asked whether the judgment by motion was not known to Graves, and wanted by him and all the sureties. His answer is: "Yes, sir, and old man Byram urging it." The testimony is not sufficient, under the circumstances, to show that Graves participated in taking the judgment by motion, nor, of course, even if he did, that he thereby became a party to the attachment suit. Besides, it is not shown that he knew the facts in relation to the judgment in the attachment suit at the time of the meeting at the lawyer's office. And he had long

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before conveyed the lands in controversy by the trust assignment. If the judgment was void, it could not be validated as to third persons who have previously acquired rights, nor perhaps as to the party himself. But the party may be personally estopped by his subsequent acts from contesting rights acquired under it: *Haynes v. Powell*, 1 Lea, 347. He cannot estop other persons claiming under him by act antedating the estoppel.

The complainant is, therefore, not entitled to be subrogated to any rights as against the land attached. But he is entitled to a decree against McDowell and Graves for their respective contributory parts of the overpayment made by him as surety, the judgment against McDowell to be credited with one-half of any collections made out of Graves, and McDowell to be subrogated to one-half of the recovery against Graves, if he, McDowell, pays in the first instance the recovery against him, and so in proportion to his payments.

The decree of the chancellor will be reversed, the report of the Referees set aside, and a decree entered here in accordance with this opinion. The complainant and the defendants, McDowell and Graves, will pay the costs of the entire cause.

Chaney v. Bryan.

NANCY CHANEY v. A. C. BRYAN *et al.*

1. HUSBAND AND WIFE. *Decree for divorce.* If a decree of divorce, granted by the courts of another State, is relied on in this State in bar of the rights of the wife or widow, she may contest the validity of the same by showing the want of some jurisdictional fact, although in contradiction of the recitals of the record.
2. SAME. *Deed of separation. Void When.* A deed of separation between husband and wife, and settlement of property by the husband on the wife during coverture, acted on by all parties until the husband's death, is void at the election of the wife; but if she elect to avoid the settlement it becomes void as to the husband, and she must account for the property conveyed which was not expended for her support and maintenance during the coverture.
3. SAME. *Same. Same.* The property must be accounted for to the husband's estate for the benefit of whom it may concern, and a devisee of the husband may require such an account as well as the heir.
4. DOWER. *Same.* A widow residing in another State, who seeks dower of land in this State devised by the will of her husband, and who is required to account under a deed of separation and settlement for property of far more value than the dower, cannot recover dower if she admits that she has parted with the property, and cannot account for it.

FROM SUMNER.

Appeal in error from the Circuit Court of Sumner county. JO. C. STARK, J.

B. F. ALLEN and J. J. TURNER for Chaney.

C. R. & LEE HEAD and W. H. MULLIGAN for Bryan.

COOPER, J., delivered the opinion of the court.

H. M. Chaney intermarried with the complainant, Nancy, in 1834, and lived with her in Kentucky until

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1870, having by her several children. On December 31, 1870, H. M. Chaney, in consideration, among other things, of a deed or agreement of separation between him and his wife, conveyed to her the tract of land on which they lived, shown to be worth about eight thousand dollars, during her natural life, and then to go to her children. On the same day, and as a part of the same transaction, the husband on the one part, and the wife and Robert Chaney, one of her children, as, her trustee, on the other part, entered into what they call a "deed of release and separation," which was signed by her and her son, duly acknowledged by her before the clerk of the county court of the county in which they resided, and recorded in his office. By this instrument, she and her trustee "release forever, all claim of the said Nancy Chaney to all the other landed estate and personal property of the said Hillary (H. M. Chaney), whatever, hereby fully surrendering all her potential right to the same unto him the said Hillary forever." The instrument further provides for a perpetual separation of the principal contracting parties. Shortly afterward, H. M. Chaney went to the State of Indiana, and by a petition filed against his wife in the month of June, 1871, promptly during the next month, obtained a divorce. Afterward, in September of the same year, he came to Sumner county in this State, bringing with him another woman, whom he introduced as his wife, and bought a farm for nine thousand dollars cash, now shown to be worth about seven thousand five hundred dollars, on which he continued to reside.

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The woman he had passed as his wife left him; and he wrote to his niece, Sallie Bryan, the wife of the defendant, A. C. Bryan, then living in the State of Indiana, proposing that if she would come and take care of him, he would give her the Sumner farm at his death. She and her husband did come, and took charge of him until his death, on January 23, 1876. Afterward, they caused an instrument in writing to be propounded as the holographic will of H. M. Chaney, which purported to devise the farm to Sallie Bryan. The probate was contested in the circuit court of Sumner county, and, after several trials a verdict was found in favor of the will, and judgment rendered thereon. This judgment was affirmed by this court at the present term. In the meantime, on August 5, 1880, Sallie Bryan died, leaving her surviving, her husband and one son by him. On November 23, 1880, the present bill was filed by Nancy Chaney to have dower allotted to her in the Sumner county land. As the bill comes before us it is filed against A. C. Bryan and son, and the personal representative of H. M. Chaney. Bryan and son set up in defense the Indiana divorce, and the deed of release and separation, with the accompanying conveyance. Upon final hearing, the chancellor held the decree of divorce to be fraudulent and void, and gave the complainant dower in the land. The Referees, or rather a majority of them, report in favor of affirmance. The defendants except.

There can be no doubt that when a decree of divorce, granted by the courts of another State, is

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relied upon in this State in bar of the rights of the wife or widow, she may contest the validity of the same by showing the want of some jurisdictional fact, although the record show or recite the existence of the fact: *Gettys v. Gettys*, 3 Lea, 260. We concur with the chancellor and the Referees in the conclusion that the proof clearly demonstrates that H. M. Chaney was not a resident of the State of Indiana for twelve months next preceding the filing of his petition for divorce, and that there was no personal service of process upon the wife under the petition. The decree of divorce was, therefore, void.

It is suggested by the counsel of defendant that the deed of release and separation was valid under the laws of Kentucky, but no statute or decision has been produced tending to sustain the contention. But the Referees all concur in finding that, by the rulings in this State, the deed of release and separation, with the accompanying conveyance of the husband of his farm to the wife and children, would be void as to the wife at her election, but if she elect to take dower and a distributive share of the husband's estate, she must account for the property conveyed in the deed which was not expended for her support and maintenance during the coverture. *Watkins v. Watkins*, 7 Yer., 283; *Parham v. Parham*, 6 Hum., 287. But a majority of the Referees thought the widow could only be made to account by her husband's heirs, not by his devisees. In both of the cases cited the husband seems to have died intestate, and the accounting of the widow enured to the benefit of the heirs. But

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the principle of the decisions is that the widow must account for the benefit of the husband's estate without reference to the parties who might be interested in its assets. If the husband were to make a will, in such a case, giving his estate to a part of his children, or to all of them in different proportions, it would scarcely be contended that the widow would not be required to account, merely because the children claimed as devisees, not as heirs. No reason is suggested by the majority of the Referees, nor has any occurred to us, why persons claiming as legatees or devisees of the husband should stand in a different position from the heirs. Even a creditor would have a right to say to the widow, if you have a right to elect between two funds to one of which I have a claim, and you elect to take my fund, you must allow me to be subrogated to so much of the other fund as I would have been entitled to receive from the fund you have taken.

If, therefore, the complainant elects to take dower in the land of the defendants, she should account to them for so much of her life estate in the Kentucky land as would be equivalent in value to the dower estate thus taken. A life estate in land worth eight thousand dollars is worth far more than dower of one-third of land worth seven thousand five hundred dollars. We can see, therefore, that to allow dower, and require the widow to account for its value in the other land in which she has a life estate, would be a useless circumlocution. Moreover, the complainant says she has disposed of her estate in the Kentucky

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land by gift to her children. It does not appear how or when she made the disposition. But her admission is sufficient to render it necessary for her, before she can deprive the defendants of the benefit of her husband's bounty, to show that she is in a condition to re-imburse them for the loss by producing and tendering the necessary conveyances. The parties claiming under her are non-residents of the State, and cannot be brought before the court by the defendants, nor even by the complainant *in invitum*, to enable the courts of this State to make a decree binding upon them. We can see, moreover, as said above, that anything the complainant could do, under the circumstances, would be a useless circumlocution, and that she has already made her election to abide by her husband's gift to the extent of the dower interest now sought. She has left us no option except to dismiss her bill.

The report of the Referees will be set aside, the decree of the chancellor reversed, and the bill dismissed with the costs of the cause.

Whitworth v. Ewing.

GERTRUDE B. WHITWORTH, by next friend, v. ROBERT EWING.

1. *WILLS. Legacy. Interest.* A testator by his will directed his executors to set apart the sum of \$20,000 in gold, and let it remain as so much unproductive capital, not even lending it on interest, and on the day that his great-granddaughter (naming her) arrived at the age of twenty-one years to pay over to her the said sum in gold as a birth-day present, the legacy not to vest in her until that day. The executor collected the requisite amount of funds, and then loaned the same on time, at the rate of ten per cent. per annum, payable in gold. *Held*, that the legatee was entitled to the interest.
2. *SAME. Construction.* The testator devised and bequeathed the residue of his estate to his executors, who are also made testamentary trustees, in trust to keep the estate together to the best advantage, the interest, rents, issues and profits to be appropriated for the education, benefit, support and maintenance of his said great-granddaughter, then an infant, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to his executors "for said interest, rents, issues and profits, and the same" not to be liable for the debts of any husband, and, upon her death leaving issue, the executors are to convey "the *corpus* of said estate devised to them as aforesaid in trust," unto such issue; but should she die without issue living, then "the *corpus* of said estate, including any interest, rents, issues and profits, not used or appropriated for the benefit of said great-granddaughter, and also including said legacy of \$20,000 in gold, should the same not have vested," to be disposed of to certain other persons in remainder. *Held*, that the will, in the contingency of the first taker leaving issue, gave to her all the "interest, rents, issues and profits" of the estate, and that there is not enough on the face of the will to show a change of intent in the contingency of not leaving issue.

FROM DAVIDSON.

Appeal from the Chancery Court at Nashville. A. G. -MERRITT, Ch.

DEMOSSE & MALONE for complainant.

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EAST & FOGG for defendant.

COOPER, J., delivered the opinion of the court.

On October 19, 1870, Charles Bosley departed this life in Davidson county, where he had long resided, having first made and published his last will and testament, which was duly proved and admitted to record. Only one of the executors named in the will qualified, and he was, on May 1, 1874, removed as executor and testamentary trustee by a decree of the chancery court at Nashville in a suit brought for that purpose by the present complainant, then Gertrude Bosley Bowling, an infant, by next friend. By the decree of removal "all the right, title and interest" of the executor and testamentary trustee, in and to the estate of the testator, both real and personal, vested in him by the will were "divested out of him and vested in Nathaniel Baxter, Jr., as clerk and master of the chancery court, and his successors in office, in trust for the parties entitled thereto, but subject to the further orders of the court as to the appointment of a trustee," etc. On November 22, 1876, Baxter, having been succeeded in the office of clerk and master by Robert Ewing, tendered his resignation as receiver in the suit in which he had been appointed, which was accepted by the court, and thereupon the court appointed Robert Ewing, clerk and master of the court, receiver in the cause in the room and stead of N. Baxter, Jr., resigned. Both Baxter and Ewing administered the trusts of the will under the orders of the court, and with the approval of the next friend,

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who was also the grandfather of the complainant. On October 4, 1881, the complainant intermarried with J. L. Whitworth, and on July 8, 1882, the bill now before us was filed by complainant, by her husband as next friend, against Robert Ewing, for a construction of the testator's will, and a settlement of the defendant's accounts.

The will made provision for the testator's widow, who has since died, and contains some specific devises and bequests not necessary to be noticed. It then proceeds as follows:

"I direct my executors to set apart the sum of \$20,000 in gold, and to preserve it as a sacred fund, letting it remain as so much unproductive capital, not even lending it on interest, and on the day that my great-granddaughter, Gertrude Bosley Bowling, arrives at the age of twenty-one years, I wish my executors to pay over the said sum of money in gold to her as a birth-day present, for her sole and separate use, not to be liable for the debts or contracts of any husband she may ever have. This legacy is not to vest until said Gertrude reaches her majority.

"The rest and residue of my estate, real, personal and mixed, including the reversion of the lands given to my wife, and also including the legacy of personalty bequeathed to her, should she not survive me, I give and devise to my executors hereinafter named, who are also constituted testamentary and executory trustees, or to the survivor of them, or to either one who may accept the trust, his or their heirs and assigns, in trust nevertheless for the following uses

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and purposes, that is to say: ' The estate is to be kept together to the best advantage, as near as possible in the manner heretofore pursued by myself, the interest, rents, issues and profits of which are to be used, applied and appropriated for the education, benefit, support and maintenance of my great-granddaughter, Gertrude Bosley Bowling, now an infant, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to my executors for said interest, rents, issues and profits, and the same not to be liable for the debts or contracts of any husband she may ever have; and, upon the death of said Gertrude, leaving issue at the time of her death, said executors are required to transfer and convey the *corpus* of said estate, devised to them as aforesaid in trust, unto any child or children of said Gertrude who may be living at the time of her death, share and share alike, in fee simple forever; and if any child may have died during Gertrude's life leaving children or issue, said children or issue to represent or take the share of the parent. But should said Gertrude die without issue living at the time of her death, then the *corpus* of said estate, including any interest, rents, issues and profits not used or appropriated for the benefit of said Gertrude, and also including said legacy of \$20,000 in gold, should the same not have vested, is to be disposed of as follows: That is to say, I give \$15,000 to Girard Brandon and his wife, or the survivor of them, of the State of Mississippi; and I also give \$15,000 to my wife should she be then living; and all the re-

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mainder of my estate, including all lapsed legacies, etc., so that I may not die intestate as to my property, is to pass to, and vest absolutely, according to the laws of descent and distribution, in the persons, whoever they may be, who would have inherited the estate as my heirs and distributees had I then, that is at the time of Gertrude's death, died intestate, and without wife, children or issue living at the time of my death," excluding, however, certain specified heirs and distributees, and their heirs.

It is stated in the bill, and admitted in the answer, that the sum of \$20,000 in gold has never been set apart for the complainant as required by the will, but that the monies of the estate have been loaned at interest. And one object of the bill is to have the complainant's right to the interest received on the \$20,000 declared. The complainant was not of age at the filing of the present bill, nor it seems when the decree below was rendered. But it is stated in the brief of the defendant's counsel, that she is now of age. Another object of the bill is to have a construction of the will as to the complainant's rights to the "interest, rents, issues and profits" of the estate. The chancellor was of opinion that the complainant was not entitled to the interest realized on the \$20,000, and was only entitled out of the interest, rents, issues and profits, to an annual sum sufficient "for her education, benefit and maintenance," the excess of rents, etc., to become a part of the *corpus* of the estate. The Referees report in favor of an affirmation of the decree on the first point, and a reversal

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on the second. Both parties have filed exceptions which only bring these points before us.

The chancellor was of opinion that the complainant was not entitled to the interest on the \$20,000, because the fund had never been set apart as required by the will, and could not vest in complainant until she came of age. The fund was therefore a part of the estate, and the interest must also be treated as a part of the estate. The Referees incline to the same view, but say that the point is not material if they are correct in holding that the entire interest and income go to the complainant. If she gets the entire income it is, of course, a matter of no consequence from what source any part of it was derived. If the \$20,000 had actually been set apart in gold, as directed by the will, and the executor or trustee had subsequently used the gold and made a profit, it would seem clear that he could only be held to account therefor by the complainant if she came of age. The breach of trust would be as to a particular fund in which no other person could have an interest, in the event which had happened, except the legatee. In *Dimes v. Scott*, 4 Russ., 195, where an executor, instead of realizing an asset and investing the proceeds in the three per cent. consols for the benefit of a tenant for life, allowed the asset to remain in the form of a loan by the testator at a higher rate of interest, it was held that the tenant for life was only entitled to the income of an investment in consols. But in *Stroud v. Gwyer*, 28 Beav., 130, where a testamentary trustee, instead of investing the proceeds

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of an asset actually realized in consols, loaned the fund at a higher rate of interest, it was held that the tenant for life was entitled to the entire income. In *Stephenson v. Harrison*, 3 Head., 729, a testator directed his executors to sell certain land and deposit the proceeds in a designated bank for the benefit of his slaves, who were to be emancipated after his wife's death. The widow sought to hold the executors to account for the profits made by them on the proceeds of the sale of the land. This court held that she was not entitled to an account. The opinion adds: "It was not the intention of the testator that this fund should be used by any one, but to remain in bank securely for the slaves at the death of the widow. But if any profit was made upon it by the executors, it would constitute an addition to the fund for the same purpose. It was an accumulation that must go with the fund, whether made with or without authority. The trustees can have no benefit from it themselves, nor can it be separated from the fund for the benefit of any one else." The reason of these rulings is that a fund once fixed with a trust becomes so far separated from the general assets of the estate that the trustee must account to the beneficiary for profits, "whether made with or without authority." It is not necessary that the beneficiary should have a vested interest in the fund at the time of the breach of trust. The slaves in the *Stephenson* case could take nothing until emancipated, after the death of the widow. It is enough if the beneficiary subsequently acquires a vested interest under the will.

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The record in this case shows that the personal assets have, with slight exceptions, all been realized. The answer of the defendant, while conceding that the gold has perhaps never been set apart as ordered, adds: "The account sought by this bill may, however, show that the executor, in attempting to partially carry out the direction of the will in this regard, lent out about the sum named, and took notes therefor payable in gold. But these notes, with other assets, upon his settlement, he turned over to N. Baxter, Jr., clerk and master, and such of these notes as were not paid by the makers to said Baxter were by him delivered to this respondent." It appears from the record in the suit brought by the complainant to remove the executor, which is necessarily referred to by the pleadings in this cause, although not copied into the record, that the course of the executor, in loaning instead of setting apart the \$20,000, was taken only after consultation with the grandfather of the complainant, who became her next friend in the suit, and who not only advised the loaning of the money, but borrowed \$5,000 of it on ten years' time at ten per cent. per annum interest, securing the loan by mortgage on realty: *Bowling v. Scales*, 2 Tenn. Ch., 63. It fairly appears therefore, that the money was realized to be set apart, and was then, by a breach of trust, loaned upon notes bearing interest at the rate of ten per cent. per annum and payable in gold. The interest in such a case would follow the trust fund.

The difficulty in the residue of the will, which

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we are asked to construe, is in reconciling the language used in all its parts so as to work out a definite plan. There can be no doubt that an active trust is created for the management of the residue of the estate during the life of the complainant, and then there is a devise over in two different contingencies, that is to say, in the event the complainant leaves issue living, and in the event she leaves no living issue. Obviously, we would suppose that what was to go over would be the same, or substantially the same, in each contingency. But taking the words used literally, only the *corpus* of the property would go to the children, while, in the absence of issue, the testator's heirs would take, in addition, a part of the rents and profits. The chancellor has cut the knot by treating the word "*corpus*" in the devise over to the children or issue as meaning the same as the *corpus*, "including any interest, rents, issues and profits," etc. of the devise over to the heirs of the testator. The Referees think that the general intent was to give to the complainant the entire net income, and that this intent should not be thwarted by implication.

If the devise consisted solely of the first part down to the devise over to complainant's issue, it would be difficult to raise a doubt as to the testator's meaning. He gives the residue of this estate to his executors, constituted testamentary trustees also, in trust to be kept together to the best advantage, as near as possible in the manner pursued by him, the interest, rents, issues and profits to be appropriated for the education, benefit, support and maintenance of his

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great-granddaughter, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to the executors for said interest, rents, issues and profits. The language thus far plainly implies that the whole of the net income, after deducting the expenses of keeping the property together to the best advantage, and not merely a sum sufficient for the education, support and maintenance of the legatee, should go to her. The will uses the additional word for the "benefit" of the legatee, and requires only her receipt for the payments, and not vouchers showing a proper use of the fund. The will says, moreover, that the receipt of the legatee shall be a good voucher "for said interest, rents, issues and profits," the whole of them, and not for a part. It then provides that the "same" interest, rents, issues and profits shall be "for her sole and separate use," and not be liable for the debts or contracts of any husband of the legatee, a provision manifestly of no avail if the payments of interest, etc., are limited to the actual expenditures for the education, support and maintenance of the legatee. The will contemplates that the payments will exceed the wants of the ward, and provides that the excess shall constitute a sole and separate estate. Then, as if to make the meaning too clear for doubt, the will provides that, upon the death of the legatee, the executors shall convey the "*corpus* of said estate devised to them as aforesaid in trust," not a *corpus*, including interest, rents, etc., but the *corpus* devised in trust. The whole clause, and each separate part, carry the same meaning, a

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gift of the income to the legatee for life, and a devise over of the *corpus* to the remaindermen.

"But," adds the will, "should said Gertrude die without issue living at the time of her death, then the *corpus* of said estate, including any interest, rents, issues and profits, not used or appropriated for the benefit of said Gertrude, and also including said legacy of \$20,000 in gold, should the same not have vested, is to be disposed of," etc. If we construe the words "including any interest, rents, issues and profits not used or appropriated for the benefit of said Gertrude" as covering the whole income during the entire life of the first taker, then it is obvious that the latter clause is inconsistent with all that has gone before, and the result would be, that while the tenant for life would take the whole of the net income as against her own issue, she would not have the same right as against the remaindermen in the contingency of not leaving issue. In other words, while the executors are ordered to pay the net income of the *corpus* of the estate to the tenant for life, taking her receipt therefor as a sufficient voucher, in the one contingency, their duties would be altogether different in the other contingency, and this, too, without any direction for accumulation anywhere in the will, and without any clear declaration of a change of intent, and, in fact, without any change of intent, except what we may choose to imply from the words "including any interest, rents, issues and profits not used and appropriated for the benefit of the said Gertrude." But these latter words are immediately succeeded by the

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following: "And also including said legacy of \$20,000 in gold should the same not have vested." The testator, no doubt, intended that so much of the residuary estate as was not vested in the tenant for life, at her death without issue living, should go over, and thinking perhaps that, if she died under age, there might be some income not vested in her, the doubtful clause was added. In fact, the entire net income during her life had become vested in her by the previous part of the devise, and the clause in question had nothing to operate on, unless, indeed, we treat it as changing the first part of the devise *in toto*. But we think the words, under the circumstances, do not clearly disclose a change of intent, and are not sufficient to work so radical a difference in the interest of the beneficiary for life. That interest was intended to be precisely the same in either contingency of the devise over, except as to property, if any, not actually vested in the beneficiary at the time of her death.

The decree of the chancellor will be reversed, the report of the Referees modified, and a decree entered in accordance with this opinion. The costs will be paid out of the income of the trust estate.

Howard v. Wheatley.

W. A. HOWARD *et al.* v. F. M. WHEATLEY *et al.*

1. **WILLS.** *Devise upon condition precedent.* A devise of land to the children of the testator's daughter "on condition" that the daughter release the estate of the testator from all liability to pay a note which the daughter holds, is a devise upon a condition precedent, and no title to the land vests in the children until the condition is complied with.
2. **SAME.** *Same. Rights of creditors.* The rights of a creditor of the estate to the land thus devised, acquired under judicial proceedings, to which the testator's daughter was a party, claiming as the heir of the father, cannot be affected by a subsequent offer to comply with the condition imposed by the devise.
3. **SAME.** *Same. Same. Lien.* Nor would a prompt compliance with the condition affect the lien of a creditor on the land acquired in the life-time of the testator, nor the rights of a general creditor properly prosecuted.

FROM MAURY.

Appeal from the Chancery Court at Columbia. JNO.
A. TINNON, Sp. Ch.

McKAY & FIGUERS for complainants.

W. S. RAINEY for defendants.

COOPER, J., delivered the opinion of the court.

On November 29, 1867, Samuel Wheatley departed this life in Maury county, where he had long resided, leaving as his only heirs-at-law F. M. Wheatley, A. C. Wheatley and Sarah M. Howard, the wife of I. L. Howard. On January 7, 1868, A. C. Wheatley was appointed and qualified as administrator of the dece-

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dent's estate, and on May 12, 1868, suggested the insolvency of the estate to the county court. On March 8, 1869, A. C. Wheatley, as administrator and heir, together with F. M. Wheatley, as co-heir, filed a bill in the chancery court against Howard and wife for a sale of the lands of the estate to pay debts, and for the benefit of the heirs. On September 4, 1869, Isaac N. Byers and wife filed a bill against the said heirs and administrator, and enjoined the sale of the land, claiming the same under an execution sale thereof made in the life-time of Samuel Wheatley; the redemption thereof by successive creditors of Samuel Wheatley, the conveyance of the land to N. M. Byers, as the final redeeming creditor, by the sheriff, and a conveyance by N. M. Byers to I. N. Byers and wife. The administrator and heirs answered, denying the validity of the complainant's title, and filed a cross-bill to set up a parol agreement extending the time of redemption. The allegations of the cross-bill were denied by Byers and wife. The result of the litigation was that, by a decree of this court, the sheriff's deed to N. M. Byers was held void for want of the necessary recitals showing properly the judgment, execution and levy under which the sale was made. But the court was of opinion that the equitable title to the land passed to the purchaser under the judgment, execution, levy and sale by the sheriff shown by record evidence outside of the deed of the sheriff, and that this equitable title passed to Byers and wife by the subsequent redemptions and the conveyance of the land to them by N. M. Byers, so far,

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at any rate, as to give them an equitable lien for the redemption money. The court thereupon, in affirmance of the chancellor's decree, declared an equitable lien on the land in favor of Byers and wife for the amount paid in redemption of the land, and ordered the land to be sold in satisfaction thereof. This decree was rendered on March 12, 1874, and the opinion of the court is reported in 3 Baxt., 160. The decree ordered the debt of Byers and wife to be first paid out of the proceeds of the sale of the land, and the residue of the purchase money to be paid into the office of the clerk and master at Columbia for the benefit of the heirs of Samuel Wheatley, deceased, subject to a lien for the fees of the defendants' counsel. The decree further directed, to the end that all proper accounts might be taken for the rents of the land and for the settlement and distribution of the funds, that the cause be remanded to the chancery court. In October, 1874, about 177 acres of the land were sold by the clerk of this court to W. A. Howard for \$2,990. Howard having failed to pay his notes given for the purchase money, the land was resold to J. M. Mays for \$1,415 cash. In October, 1878, 119 acres of the land were also sold by the clerk of this court, and it is this part of the land, or the proceeds of the sale thereof, involved in the suit now before us, to J. S. Allen for \$1,300, on a credit of one and two years. The decree confirming this sale directed the clerk, as the notes were paid, after first retaining costs, to pay the balance due Byers and wife, then taxes and attorneys' fees, if any, and the residue to the heirs of Wheatley.

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Allen paid his first note to the then clerk of this court, who failed to account for it. Afterward, in January, 1880, upon the motion of Byers and wife against the defaulting clerk, and upon their further motion against his successor in office to require him to pay them out of the proceeds of Allen's second note, this court held that the payment to the first clerk was payment to them, and that they must look to him for their money, taking nothing by their motion against his successor in office. Afterward, at the December term, 1880, of this court, the whole cause was remanded to the chancery court at Columbia.

On March 21, 1881, the bill before us was filed in the chancery court at Columbia, by the five adult children of I. L. Howard and Sarah M., his wife, against the two infant children of Howard and wife, against Howard and wife, and against F. M. Wheatley and the two children of A. C. Wheatley, who had died about 1874. The object of this bill was to set up title in the children of Howard to the 119 acres of land sold to J. S. Allen as aforesaid, and, on the strength of that title, to obtain the purchase money received from Allen by confirming the sale made to him. The bill states the foregoing facts, and refers to the records and papers in the suit to sell the land, and in the suit of Byers and wife, for a full understanding of the facts. It then states that those causes had proceeded and been conducted as if, and upon the supposition that, Samuel Wheatley had died intestate, whereas he had made a will, which was duly proved and recorded on December 6, 1869. By this

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will, executed on March 29, 1866, Samuel Wheatley devised to his grand-children, the issue of his daughter, Sarah M. Howard, the 119 acres in controversy by metes and bounds. But the will, which contains only the one devise, concludes with these words: "This bequest is made on condition that my daughter, the said Sarah M. Howard, shall release my estate from all liability to pay a note which my daughter, the said Sarah M. Howard, now holds against me." The bill avers that a particular note of the decedent, made payable to I. L. Howard, the husband of Sarah M., was the note referred to in the condition, and that this note was surrendered to the representative of the decedent's estate for cancellation, and no effort was ever made to collect the same. It is charged, therefore, that the condition of the will had been complied with. The bill insists that the sale of the land, and the proceedings in the causes under which it was sold were void as to the devisees, because they were not parties to the suits, but seeks only to reach the proceeds of sale, the devisees being satisfied with the price the property brought. The defendants, the Wheatleys, and Byers and wife, put in issue the compliance with the condition of the will, and Byers and wife, in addition, insist upon the equitable title or lien acquired by them on the land, as found by the decree of this court, in the life-time of Samuel Wheatley.

The final hearing by the chancellor, November 5, 1881, was upon the proceedings in the cause, "and also upon the record in the case of I. N. Byers and wife against A. C. Wheatley and others, and the record

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of A. C. Wheatley and others against Howard and wife," from all of which he was of opinion that the condition of the will had been complied with, and that the title to the land devised had vested in the children of Sarah M. Howard; that the proceedings under which the land was sold were void as to them; and that they were entitled to the relief sought. The decree perpetually enjoined Byers and wife from collecting or disposing of the funds arising from the sale of the land. But the decree adds: "It being suggested to the court that said funds are in the hands of the clerk and master of this court in the cause of I. N. Byers and wife against A. C. Wheatley, administrator, and others, and that possibly claims of creditors of the estate of Samuel Wheatley, deceased, have been filed in said cause for payment, the clerk and master will retain said fund as the same is now being held, subject to the future orders of the court in that case." Byers and wife and the Wheatleys prayed and obtained an appeal, but Byers and wife alone perfected their appeal by giving bond.

The Referees find that the condition of the devise was not complied with, but they are also of opinion that, even if the condition had been performed, the will could not affect the rights of Byers and wife as creditors of the testator's estate, the debt being an equitable lien on the land. They report that the chancellor's decree should be reversed, and that Byers and wife should be paid the balance of their debt, not otherwise satisfied, first out of the proceeds of the sale of the land, the cause being remanded for the

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execution of the decree. They suggest that it is a proper case for each party to pay one-half of the costs of this court.

Byers and wife except to that part of the report which proposes to charge them with one-half the costs of this court. And the Howards file exceptions which open the case as to them.

It is tacitly conceded by the bill, and in argument, that the condition of the devise under which the complainants claim was a condition precedent, and that the devisees took no vested interest in the land until the condition was performed. We have had occasion, recently, to consider the law governing such testamentary provisions, and are of opinion that the concession has been properly made: *Cannon v. Apperson*, 14 Lea, 553. Howard and wife were parties defendant both to the bill of A. C. Wheatley and F. M. Wheatley for the sale of the land in controversy, and to the bill of Byers and wife claiming the same land. Howard's wife was made a defendant in both cases as one of the heirs of Samuel Wheatley, and she and her husband asserted her rights accordingly. A decree for the sale of the land was obtained in the Wheatley case, which was enjoined by the bill of Byers and wife. The Wheatleys and the Howards answered this bill, and filed a cross-bill in their character of heirs, insisting upon their right to the land, and seeking a dissolution of the injunction obtained by Byers and wife. The cross-bill seems to have been filed after the probate of the will of Samuel Wheatley, and was sworn to by Howard, the

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husband. Both of these cases were pending in court for many years before they were finally heard, and afterward to execute the decrees. During all these years Howard and wife were acting as heirs, and claiming the land or its proceeds accordingly. Not the slightest intimation was given by them that they had complied, or ever intended to comply, with the condition of the will. On the contrary, the husband handed the note, with two other claims held by him against Samuel Wheatley, to the clerk of the county court, in which court the suggestion of the insolvency of the estate had been made, and the clerk marked the note, as well as the other claims, as filed, and entered them upon his book of insolvent claims in the case. This was on September 6, 1869. In the meantime A. C. Wheatley, the administrator, died in the year 1874, and John G. Horsely was appointed in his place, but resigned in a few months. Then H. T. Gordon was appointed administrator. On August 19, 1875, I. L. Howard, the husband, withdrew the note from the county court, and handed it to Gordon, who gave him a receipt therefor, saying: "This note filed with me to-day as the administrator of Samuel Wheatley." Gordon testifies that he was at that time expecting to realize a considerable sum of money on a claim of the estate against the United States government, and understood that the note was placed in his hands for the purpose of receiving its share of the fund, he having had several conversations with Howard in relation to the government claim, and his expectation of collecting it. He adds: "I did not receive

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the note as the administrator of Wheatley to be cancelled, nor was any thing said to me by any of the parties to indicate to me that *that* was their intention." F. M. Wheatley testifies that Howard and wife, sometime after Samuel Wheatley's death, told him that they had filed all their claims, including the note in question, against the estate.

Under these circumstances, we think I. L. Howard is simply mistaken when, in his deposition taken in this cause, he says that he left the note with the county court clerk merely to be held until called for by him, and that he delivered it to Gordon as administrator to be cancelled. And no matter what may have been the intentions of Sarah M. Howard in the premises, and conceding the fact to be as she now testifies, that she always intended to comply with the condition of the devise, it is very certain that neither she nor her husband ever actually complied with the condition, unless they may be treated as having done so by their answer in this cause. Whether that compliance is not in time as against their co-heirs, it is unnecessary to enquire, for the Wheatleys have not appealed from the chancellor's decree. The compliance is clearly too late as to creditors who have acquired rights in the land upon the faith of their election to treat the land as descending to the wife as heir, and to file the note as a valid charge against the estate.

The Referees are also right in holding that the will would not affect the rights of Byers and wife. The Howard children, as devisees, might, if the condition precedent had been complied with, have sued Allen, the

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purchaser, for the land, upon the ground that they were no parties to the suit under which he acquired his title. But in that event, as all of our cases hold, they would be required to refund to the purchaser so much of the purchase money as was received by them, or appropriated in the payment of debts of the ancestor, which were a lien on the property: *Trousdale v. Maxwell*, 6 Lea, 161; *Coldwell v. Palmer*, 6 Lea, 652. The complainants have not proceeded against the purchaser. They have filed their bill against the particular creditor, at whose instance the land was sold, and asked to be given the proceeds of the sale, they being content to take the price instead of the land. But obviously they cannot obtain the proceeds of the sale, any more than they could recover the land, without being subject to the corresponding equity that they account to the creditor, who has the equity to which the purchaser would be subrogated, for so much of the debt as was a lien on the property. If the land had been recovered, the amount thus to be accounted for would have been the subject of a separate suit. But the complainants in this case have made the creditor claiming the fund a party, and have, in addition, expressly referred to the record and papers in the suit to sell the land, and also in the suit of Byers and wife, and the chancellor's decree shows that these records and papers were read on the final hearing, as thus referred to, and without any exception whatever. The same case is therefore before us in one suit as would have been usually embodied in two separate suits. On the face of this bill the facts are con-

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ceded to be as set out in the record and papers of the suit of Byers and wife, and it would be worse than an idle form to grant the relief sought on the basis of the invalidity of the sale as to the Howard children, and remand to ascertain the amount of the debt of Byers and wife, which was a lien on this land. We can come to no other conclusion than the court came to in the original cause. It is scarcely necessary to add that Byers and wife can only be charged with such funds as the court ordered to be paid them, and, in the absence of proof of fault, are not responsible for other orders.

The exceptions of the complainants to the report of the Referees must be disallowed, the chancellor's decree reversed, and a decree entered in accordance with the report, except as to the costs of this court. The complainants will be charged with all the costs of the court below, and of this court, the exception of Byers and wife to the report of the Referees in the matter of costs being well taken.

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WM. J. HAMMOND v. WM. M. BEASLEY, *et al.*

1. GUARDIAN'S BOND. *New surety signing old bond.* Under the provisions of the Code regulating the discharge of the surety of a guardian from further liability on the guardian's bond, the new security to be approved by the court may be given by the new surety signing the old bond.
2. CHANCERY PLEADINGS AND PRACTICE. *Guardian settlement.* If, upon a bill filed by a ward, after coming of age, against his guardian and the sureties of the guardian bond for an account, alleging various breaches of the bond, the court make a general reference covering all breaches, the omission of the clerk to report upon any particular breach contended for in the pleadings and proof, would be a proper ground of exception to the report; and if the complainant failed to raise the point by exception, or in any other way, and in the meantime claim and obtain the benefit of a suit brought by the guardian to cover the matter of the breach, he will be held to have waived so much of the relief sought.
3. SAME. *Same. Guardian relieved. When.* A guardian will be relieved from the charge of the notes of his predecessor which turn out not to have been intended as notes, but informal receipts of the assets of the ward.
4. SAME. *Same. Credits.* Credits may be allowed a guardian for a series of years not in excess of the income of the ward for those years, although the credits of a particular year may exceed the income of that year; and the credits given in the regular settlements of the county court are *prima facie* good without producing the *vouchers*, if not surcharged or falsified by pleadings or proof.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

T. M. JONES for complainant.

W. H. McCULLUM and A. J. ABERNATHY for defendants.

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COOPER, J., delivered the opinion of the court.

In the year 1860, James Hammond died intestate in Giles county, and in December of that year, James White and Thos. H. Noblett were appointed and qualified as administrators of his estate. During the same month E. A. Beasley was appointed guardian of W. J. Hammond and Mary Jane Hammond, two children of the deceased, and qualified by giving bond, with Wm. M. Beasley and Thos. S. Fogg as his sureties, for the faithful performance of his duties. The administrators of the estate of James Hammond, in the course of the administration, made distribution of assets to the distributees, but instead of taking receipts with refunding bonds, they adopted the plan of taking the notes of the distributees for the payments, so as to be in a condition to sue for and recover back overpayments. During the years 1861 and 1862, the administrators made various payments to E. A. Beasley for his wards, and took his notes as guardian therefor, payable to them at one day. E. A. Beasley died, in September, 1863, and Thos. S. Fogg was appointed and qualified as administrator of his estate, the insolvency of which he suggested to the county court, on February 26, 1867. On April 9, 1866, Wm. M. Beasley was appointed as guardian of W. J. Hammond, and qualified by giving bond with James D. Anthony, M. M. Mitchell and Jos. S. Edmondson as his sureties. On February 3, 1868, the guardian renewed his bond, with M. M. Mitchell and Thos. S. Fogg as sureties. In May, 1868, Mitchell applied to

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the county court by petition to be released as such surety, and on June 1, 1868, in compliance with a rule made upon him, Wm. M. Beasley came forward with J. P. C. Reed as a surety in place of Mitchell, who signed the old bond accordingly, and it was accepted by the county court, and Mitchell released from further liability, by formal order of the court entered on the minutes. In the meantime, White and Noblett, as administrators of James Hammond, when they came to make their settlements, found that the county court clerk objected to receive the notes of E. A. Beasley as receipts, and they induced Wm. M. Beasley, as guardian of W. J. Hammond, to receive four of the notes of his predecessor in office, and give them a receipt therefor. These notes seem to have been handed to Wm. M. Beasley on May 10, 1866, and he charged himself with their amount of \$4,118.68, and interest, in his settlements made with the county court clerk, on January 30, 1868, August 24, 1870, and August 24, 1871, by the last of which the balance found against him was \$5,938.84.

On September 10, 1870, Wm. M. Beasley, as guardian of W. J. Hammond, filed his bill against Thos. S. Fogg, as administrator of E. A. Beasley, deceased, and individually, and James White and Thos. H. Noblett as administrators of James Hammond, deceased. The object of this bill was to relieve the complainant from the charge of the \$4,118.68, with interest, upon the ground that the instruments were not in reality the notes of E. A. Beasley, but only informal vouchers for the money paid over to him as guardian, by the

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administrators of James Hammond, deceased. The bill stated so many of the foregoing facts as bore upon this point, and asked for a settlement with Thos. S. Fogg, as administrator of E. A. Beasley of the guardianship of the latter as guardian of W. J. Hammond, and for a recovery of the *pro rata* of the sum found out of the estate of E. A. Beasley, which was still being administered as insolvent. It also asked that the defendant, Fogg, and the complainant, as the sureties of E. A. Beasley on his bond as guardian, be held liable for any of the recovery not realized out of the estate of E. A. Beasley. Such proceedings were had in the cause that on March 25, 1871, the court decreed that the notes of E. A. Beasley were intended by the parties as evidence of the receipt of so much money paid to him, as guardian, by the administrators of James Hammond's estate, and also as refunding bonds in the event he was overpaid; that the complainant as guardian, recover from Thos. S. Fogg as administrator of E. A. Beasley, the sum of \$5,421.84, the amount found to be due from E. A. Beasley's estate to his ward W. J. Hammond, to be filed for its *pro rata* in the insolvent suit; and that the balance of debt, after receiving the *pro rata*, should be paid, one-half by the complainant and the other half by Thos. S. Fogg, as sureties on the guardian's bond. On March 5, 1874, W. J. Hammond, who came of age on August 5, 1871, was permitted by the court to become sole complainant in the cause and substituted to the rights of Wm. M. Beasley, as guardian under the proceedings and former decree, and it

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was referred to the master to ascertain and report what had been realized in the former decree, and the balance due. At the same term, the master's report, showing that \$1,843.42 had been realized from E. A. Beasley's estate, and paid to Hammond's attorneys and assignee, was confirmed without objection, and a decree rendered in favor of Hammond against Wm. M. Beasley and Thos. S. Fogg, "jointly and severally," for \$4,529.93, and unadjudged costs, the balance unpaid of the recovery against E. A. Beasley's estate for the money due his ward, W. J. Hammond.

On September 16, 1871, Wm. M. Beasley filed his bill against his ward, W. J. Hammond, to have the same relief against the notes of E. A. Beasley, which he had already obtained against E. A. Beasley's administrator, and have his settlements with the clerk of the county court corrected accordingly, he having charged himself with those notes under a mistake of fact. He stated the proceedings in the previous case down to the decree of March 25, 1871. On December 26, 1871, the bill now before us was filed by W. J. Hammond against Wm. M. Beasley and Thos. S. Fogg, as administrator of E. A. Beasley and individually, J. P. C. Reed and M. M. Mitchell. This bill mentions the previous bill of Wm. M. Beasley of September 16, 1871, craving leave to refer to the papers therein, and sought at first to be treated as a cross-bill thereto. But it was afterward filed as an original bill against all parties. The bill stated the facts as hereinbefore detailed, and charges that Wm. M. Beasley has not faithfully executed his guardianship, and

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calls for an account. It insists upon the liability of Wm. M. Beasley for the \$4,118 with which he charged himself in his settlements with the county court, and claims, if he is not liable therefor, that he and his sureties are liable on the guardian bond for the failure of Wm., M. Beasley, as guardian, to bring suit against Thos. S. Fogg as surety on E. A. Beasley's bond, and to account for his share of the loss. One prayer of the bill is that these parties be held liable accordingly, and, if necessary to a settlement of the amount of Wm. M. Beasley as guardian, that an account be taken with said Fogg as administrator, etc.

The court, upon the pleadings and proof, made a reference to the clerk and master to take and state an account with Wm. M. Beasley, as guardian. And on final hearing the chancellor held that the proceedings in the county court had the effect to release Mitchell as surety from any further liability on the guardian bond of Wm. M. Beasley, and to make J. P. C. Reed and Thos. S. Fogg primarily liable for all previous breaches of the bond, if any. He held that Wm. M. Beasley was not chargeable with the notes of E. A. Beasley, but only with the money collected thereon by him from E. A. Beasley's estate. He found a balance due to the complainant from Wm. M. Beasley, as guardian, of \$1,716.17, and he rendered a decree in favor of complainant against Beasley, and Fogg and Reed as his sureties, for this amount and the costs. The record shows that this decree was paid by Reed on December 23, 1873. No appeal was taken from this decree, but the record was, on

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October 1, 1875, filed by complainant for a writ of error.

The Referees have reported in favor of affirming the chancellor's decree with costs. The complainant excepts.

The first exception is that the Referees erred in holding that Mitchell was released by the proceedings in the county court from liability on the guardian bond. The ground of objection is that Reed, the new security, signed the last preceding bond of the guardian, when, it is insisted, the bond should have been a new bond. The proceeding in this case, as shown by the record, was under new Code, section 4421, by "petition in writing," and notice. In such a case, as provided by section 4422, the court may compel the principal to give other sufficient security, to be approved by the court. Section 4424 is: "Upon public or private application of any surety, if the principal consents to give a new bond, with satisfactory security, it may be taken without further proceedings, with the same effect as if executed upon order." This section, it will be noticed, uses the words "new bond," upon which the argument of the learned counsel is rested, but the next section, 4425, says: "On the execution of the additional bond as required, or the qualification of a successor, the applicant security is exonerated from all liability accruing subsequently." Obviously the words, giving "other sufficient security," "new bond," or "additional bond," are merely different modes of expressing the same idea, that there must be new security, to be approved

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by the court, in place of the old security. And the simple question is, whether that security may be approved by the court if given on the existing bond, or requires a separate instrument. The record and the bond or bonds form one whole under the statute, and there is not the least reason why the surety, so far as his liability is concerned, should not execute the old bond. It thereby becomes a "new bond" as to him. And the statute saves the liability of all the other sureties, notwithstanding the change of the contract, whether the surety sign with them or separately.

The second exception is that the Referees erred in not holding Mitchell liable, even if released by the proceedings in the future, for all monies which the guardian received, or ought to have received, prior to that time. The chancellor held, as we have seen, and so have the Referees in effect, that Fogg and Reed were primarily liable for all breaches of the guardian bond before the release of Mitchell, if any. And it appears that the recovery of the complainant for all breaches allowed has been fully paid. Unless, therefore, it should be found that the complainant is entitled to a larger recovery and for breaches of the bond occurring before the release, the point becomes unimportant. Of course, the mere receipt of money before the release would not be a breach of the bond. It must be shown that the money was misappropriated, and there is no proof to that effect in this record. The bill does apparently seek to charge the guardian with a breach of duty in not suing Fogg as surety on E. A. Beasley's bond at an earlier date. But this

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part of the bill has been abandoned in the progress of the cause, perhaps because the complainant was content with the guardian's proceedings in the suit to which he made himself complainant when he came of age, and took the benefit of the decrees rendered therein. The chancellor was not asked directly, or by exception to the master's report, to pass upon that part of the bill. The order of reference was broad enough to cover any breach of the guardian's bond, and the failure of the clerk to report upon a particular breach would have been a proper ground of exception. And the question being one of diligence and good faith on the part of the guardian, in the matter under consideration, it was, under the peculiar circumstances of the case, the duty of the complainant to have had the matter directly acted on.

The third exception is to the refusal of the Referees to hold the guardian liable for the E. A. Beasley notes. But the proof clearly shows that these notes were really intended as receipts of so much money, put in such a form as also to operate as refunding bonds. The administrators of James Hammond could not have recovered judgment upon them except to the extent of an overpayment, and could not, of course, long after the maturity of the notes, transfer by their assignment any higher right to the new guardian. They were received under a plain mistake of fact, that they were binding as notes.

The next exception is that the Referees erred in holding that the guardian, without the sanction of the chancery court, could exceed the income of his ward's

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estate. The credits allowed upon the master's report do exceed the income of the funds charged, although it is otherwise in the settlements with the county court, where the guardian is charged with the Beasley notes. But we find, upon examination, that the amount with which the guardian is charged by agreement, what he received on the Beasley notes, and what was recovered on the decree obtained by the guardian against Beasley's estate will exceed \$5,000, which would be increased several hundred dollars by the annual interest on the first two items. The disbursements allowed for five years are a fraction under \$1,500. The excess of disbursements in one year may be equalized out of the profits of other years: New Code, section 3405. The disbursements are, therefore, not in excess of the interest on the realized assets. Besides, the complainant does not by his bill or by the proof undertake to surcharge and falsify the credits, or any one of them. The settlements in the county court are by law to be taken as *prima facie* correct: New Code, section 4535. And this meets the last exception, the absence of vouchers for credits.

Confirm report, and affirm the chancellor's decree, with the costs of this court against the complainant.

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ED. BRADY v. THE STATE.

CRIMINAL LAW. *Railroad agent. Ticket office.* It is a good defense to an indictment of a ticket agent at a railroad station, under the new Code, section 2359, for failing to keep open his office for one hour before the departure of a particular passenger train, that the railroad company, with notice to the public, had, by its rules, dispensed with the sale and purchase of tickets for that train, and required the passengers to pay the regular ticket fare on the train.

FROM SUMNER.

Appeal in error from the Circuit Court of Sumner county. JO. C. STARK, J.

J. J. TURNER and C. R. HEAD for Brady.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

By the act of 1865, chapter 15 (new Code, section 2359), it is made "the duty of every person who shall sell, or be authorized to sell tickets to passengers to travel on any railroad in this State, at any station or depot within the State, to open his office for the sale of tickets at least one hour before the time for the departure of each passenger train from each station or depot, and keep the same open during said space of one hour, and until the departure of each passenger train, and be always ready during said time to sell tickets to passengers as they may, during said hour, apply for them." A failure to comply strictly with

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these provisions subjects the delinquent to indictment or presentment, and, upon conviction, to be fined not less than twenty nor more than fifty dollars.

The plaintiff in error was indicted by the attorney-general *ex officio*, by order of the court, for unlawfully failing to open and keep open the ticket office at Fountain Head, a way station on the Louisville & Nashville railroad, of which station he was the ticket agent, for one hour before the departure of the passenger train on a particular morning. The judge tried the case without a jury, and found the defendant guilty. He has appealed in error.

Fountain Head is a way station on the Louisville & Nashville railroad, at which all of the trains stop except the fast express train. The defendant is the sole agent of the railroad company at that station, being ticket agent, freight agent and telegraph operator. He sells tickets for the various passenger trains which stop at that station. But, in view of his various duties, he is not required by the rules of the company to open the ticket office for the morning accommodation train, which passes the station before six o'clock, but is excused from so doing. The railroad company, in consequence thereof, instructs the conductors running that train not to charge passengers any other rate than the regular ticket rate, and passengers by that train are permitted to pay the same fare on the train as they would pay for tickets. The proof shows that this was not a new arrangement at the time alleged in the indictment, but had been in force for a year or more. It is further shown that on the

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morning of the commission of the alleged offense, the ticket office was as usual not opened for the accommodation train, although several passengers got on the train at the station.

The proof is, therefore, clear that the ticket office was not opened as required by the terms of the statute. It is equally clear that the railroad company, by its rules, had dispensed with the sale of tickets for the train in question, and had provided that the passengers might pay their fare after entering the cars at the same rate as if they had purchased tickets, and that these rules had been in force for a sufficient length of time to become known to the public. And the question is whether these facts constituted a defense to the indictment.

Of course, it would not be in the power of the company by any rules it might adopt to dispense with a compliance upon the part of its officers with a general law of the Legislature regulating the performance of a public duty intended for the benefit of passengers on the company's trains, if the law were within the competency of the Legislature. And no argument has been submitted tending to show that the statute in question was not within the police power of the State. The only ground upon which the defense relied on can be made is, that the facts do not bring the defendant within the purview of the law having in view the object of its passage, the evil intended to be remedied, and the real intention of the Legislature. And the question is one of grave difficulty.

Railroad companies, we know as matter of current

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history, adopted the plan of receiving the fare of passengers by the sale of tickets, this plan affording a check on the conduct of their own officers. And in order to render the system effectual, and to compel the passengers to buy tickets, a higher fare was imposed upon them if they undertook to pay on the trains. Under these circumstances, the statute in question, or something like it, was eminently proper, by which it was made the duty of the ticket seller to keep his office open at the most suitable hour for the passengers, immediately preceding the departure of the train, for a sufficient length of time to enable persons to buy their tickets conveniently. The act, it will be noticed, is not addressed to the company, but to the ticket seller. The power of the company over its ticket offices and ticket officers is left untrammelled. It may locate the one and prescribe the duties of the other as if the statute had not been passed. The companies might do away with ticket offices at the stations, and require passengers to pay their fares in the cars. If there be no ticket seller or no ticket office, the statute would have nothing to operate on. And the real point of difficulty in the case is to determine whether this result has not been brought about by the company's rules.

If the defendant was a regular ticket seller, required to sell tickets for all the passenger trains which stopped at his station, and passengers who got on the trains at the station were mulcted in a penalty for failing to buy tickets in advance, the defendant would be guilty under the statute beyond all doubt, and the

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company could not relieve him from the penalty by merely requiring him not to open his office; for that would be an attempt to nullify the statute. But the company, by rules of sufficiently long standing to become known to the public, dispensed with the sale and purchase of tickets for the morning accommodation train, and required the passenger to pay only the regular ticket fare on the train. The company might dispense with tickets and ticket offices altogether, in which event there would be no person to sell, or authorized to sell tickets, and no person to indict. And the question is whether the company may not do for one train, not by mere caprice, but for reasons connected with the economical administration of the company's business, what it might do for all the trains, giving the public proper and reasonable notice. The statute was intended to compel ticket sellers to perform the duty imposed upon them by their companies at the most convenient time for the passengers. It was not designed to compel them to do that from which they were expressly exempted by the rules of the company, without any detriment to the passenger, and with notice to him. The defendant was, in fact, not a ticket seller for the particular train, tickets for that train having been dispensed with by the company. Literally, the statute would apply to any person who sells, or is authorized to sell, tickets at a station for any train. But the intention of the act is to compel the performance of duty only as to those trains for which tickets are required to be purchased by the company. "The reason and intention of the law,

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when obvious, will always prevail over the literal sense of the words": 3 Head, 264.

The facts do, therefore, make out a good defense, and the judgment of the trial court must be reversed, and judgment rendered here for the defendant.

15L 633
110 611

WM. F. BALLENTINE *et al.*, v. THE MAYOR AND ALDERMEN OF PULASKI, *et al.*

15L 633
116 613
116 614

1. **CONSTITUTIONAL LAW.** *Corporations.* The provision of the Constitution, Art. xi., sec. 8, that "no corporation shall be created, or its powers increased or diminished, by special law," again held to apply only to private, and not to municipal corporations.
2. **SAME.** *Repeals.* The general law of 1872, ch. 12 (new Code, secs. 1652, 1657), which authorizes any municipal corporation to establish a system of public schools upon consent of two-thirds of the qualified voters, is not repealed by the special act of 1885, ch. 37, amending the charter of the town of Pulaski by providing for the establishment of a system of free schools by the corporate authorities, without a popular vote.
3. **SAME.** *Repeal by implication.* A repeal of a general law by implication is not within the purview of the Constitution, Art. 2, sec. 17.
4. **SCHOOLS.** *Taxes. Municipal corporations.* To establish and provide by local taxation for a system of free schools for a municipality or county, is a county and corporation purpose, within the meaning of the Constitution, Art. 2, sec. 29, which gives the Legislature power to authorize counties and incorporated towns to impose taxes for county and corporation purposes.
5. **MUNICIPAL CORPORATIONS.** *Poll tax.* The Constitution, Art. 2, sec. 29, after providing that the State poll tax shall not exceed one dollar, adds: "Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State." *Held*, that a municipal

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corporation can levy only one such tax, although an amendment to the charter may authorize an additional poll tax for school purposes.

6. **SAME. Schools. Board of education.** The fourth section of the act of 1885, authorizes the board of education of the town to "permit children living outside of the corporate limits" to attend said schools, upon paying tuition fees, to be fixed by the board. *Held*, permissive, and for the benefit of the school system, by bringing in paying pupils, the effect of which need not be considered until the power is exercised.
7. **SUPREME COURT PRACTICE.** This court has nothing to do with the policy of legislation, if satisfied as to its constitutionality.

FROM GILES.

Appeal from the Chancery Court at Pulaski. **W. S. FLEMING, Ch.**

N. R. WILKES, N. SMITHSON and H. WARD for complainants.

JOHN T. ALLEN, T. M. JONES, S. E. ROSE and A. J. ABERNATHY for defendants.

COOPER, J., delivered the opinion of the court.

The chancellor dismissed this bill on demurrer and the complainants appealed. The bill was filed for the purpose of enjoining the collection of taxes under an ordinance of the corporate authorities of the town of Pulaski establishing, by virtue of a recent act of the Legislature, a system of free schools for the children of the town. The complainants are partly citizens of the town paying taxes, and partly owners of property in the corporation subject to the proposed taxation.

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The municipal corporation of the town of Pulaski was created by special act of the Legislature in the year 1817, the charter being largely amended in 1850, and to a less extent in 1860. In 1877, and again in 1879, and once more in 1885, the Legislature by special acts amended the charter. It is the last act of 1885, ch. 37, which has given occasion to this suit. That act undertakes to amend the charter of incorporation by giving the board of mayor and aldermen of the town power "to provide for and establish a system of free schools for all classes of children in said town, between the ages of six and twenty-one years, and to regulate the same." The board is further authorized: "To levy and collect a tax for public school purposes upon all property within the town taxable under the laws of the State, and also upon all taxable polls and privileges, said tax not to exceed seventy-five cents on the hundred dollars' worth of property." The act also provides for the appointment, by the city authorities, of a board of education to see to the collection and disbursement of the school taxes, and have the charge and control of the schools. The board of mayor and aldermen of the town proceeded, by ordinance, to levy a tax on property, polls and privileges for school purposes, and to elect a board of education as required, which latter board duly organized, and entered upon the discharge of their duties. The present bill was then filed.

The first point to be noticed, for it involves the merits of the legislation, is the constitutionality of the act of 1885, amending the charter of the town of

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Pulaski. The contention of the complainants is that the act violates article xi., section 8 of the Constitution, in that it undertakes to increase the powers of a municipal corporation by a special law, whereas, it is argued, such increase of powers can, under the section cited, only be effected by a general law. The question has been ably and elaborately argued, upon the supposition made by counsel, that the question has not heretofore been authoritatively settled. And it must be admitted that the question has been one of grave doubt, both to the Legislature and the courts. It is said by one of the learned counsel of the complainants that the Legislature has recognized the true construction to be as contended for on behalf of the complainants by passing numerous general laws for the organization and amendment of the charters of municipal corporations. But the Legislature passed such general laws previous to the adoption of the Constitution of 1870, in which Constitution the section in question appears for the first time. And we know, as a matter of legislative history, that at every session of the Legislature since 1870, special acts have been passed amending the charters of municipal corporations, the record before us showing two such special amendments of the charter of Pulaski, one in 1877 and the other in 1879, besides the one now under consideration. The acts of 1885 contain also two other special amendments of the same charter, not referred to in the record. With a knowledge of these facts, this court approached the question with a due sense of its importance, and only undertook to determine it after

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the fullest argument, and the most mature consideration. The question was elaborately argued in the case of *Lueherman v. Taring District*, 2 Lea, 425. For, as will be seen from the dissenting opinion of Judge Turney in that case, there was some doubt whether the act under consideration, although in the form of a general law, was not in reality a special act confined exclusively to the territory of the late city of Memphis, and the inhabitants thereof. The point was learnedly and exhaustively argued by some of the ablest lawyers in the State. I was myself then prepared to hold, without shutting my eyes in the least to the strength of the opposing argument, as my opinion shows, that the section of the Constitution then and now under consideration, was limited to private corporations. But a majority of the court were satisfied the law was general, and preferred to put the decision upon that ground. The question again came up in *The State v. Wilson*, 12 Lea, 246, and was once more fully and elaborately argued by a number of lawyers from a bar always conspicuous for able men. In writing the opinion of this court, I was inclined once more to postpone a decision of the question by suggesting that the section of the Constitution under consideration, even if it applied to municipal corporations, would not necessarily deprive the General Assembly of all power of special legislation in regard to such corporations. But I was compelled to admit that the distinction suggested would leave a door open for legislation necessarily leading to litigation. My brother judges preferred, and I concurred with them

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in the conclusion, to put the decision on the broader ground that the constitutional prohibition applied exclusively to private corporations. The point was very fully considered by the members of the court, as the opinions of both the majority and minority of the judges show, and was expressly decided. While we concede the ability of the arguments now submitted in opposition to the view of the majority of the court, we find no sufficient reason for changing our opinion, deliberately reached, after hearing arguments equally able and elaborate, *pro* and *con*, and distinctly announced as our final conclusion.

The Legislature, by the act of 1872, ch. 12, (new Code, secs. 1652, 1657), authorized all municipal corporations to establish a system of public schools and levy a tax in support thereof, upon the consent of two-thirds of the qualified voters of the municipality given at an election held for the purpose. It is now insisted that the amendatory act of 1885 repeals the act of 1872 by "necessary implication," and is, therefore, void, because it violates the Constitution, Art. 2, sec. 17, by failing to refer to the act repealed. But if the fact were as claimed, we have settled that the section of the Constitution referred to has no application to statutes which repeal by implication: *Home Insurance Company v. Taxing District*, 4 Lea, 644; *State v. Gaines*, 4 Lea, 353; *Maney v. State*, 6 Lea, 218, 221; *Knoxville v. Lewis*, 12 Lea, 181. The act of 1872 is not, however, repealed by the act of 1885. It is still in full force, and if the corporate authorities of Pulaski had not determined to proceed under

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the act of 1885, or were hereafter to cease to act under it, they might still have the benefit of the act of 1872.

It is suggested in the bill and in argument that so long as the act of 1872 is allowed to remain in force, the power of the Legislature on the subject was exhausted. But if this means anything more than what is contended for in the preceding argument, that there must be a constitutional repeal, we are unable to see its force. The power of the General Assembly of the State over all matters of legislation is never exhausted. The only question in any particular case is, has it been constitutionally exercised?

The Constitution, Art. 2, sec. 29, provides: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law." The courts of this State have always held, that taxation is a purely legislative power, which can not be delegated except as authorized by the Constitution. *Marr v. Enloe*, 1 Yer., 454; *Keese v. District Board*, 6 Cold., 127; *Waterhouse v. Board, etc.*, 8 Heis., 857; *Lipscomb v. Dean*, 1 Lea, 546. It is conceded, therefore, that the Legislature can only authorize counties and incorporated towns in this State to impose taxes "for county and corporation purposes." And the point is made by the complainants that to establish and provide for a system of free public schools, is not a corporation purpose. It is a little curious that such a point should be made at this time, when a system of free public schools has

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been in operation, supported by municipal taxation, in several of the principal cities of this State for over a quarter of a century, and when, for at least twenty years, many of the counties of this State have been, under a general law, aiding the public schools by local taxation. The argument submitted in support of the position may be characterized as elaborate and earnest, but without much reference to the judicial decisions, except those of our own State. And yet, if any one thing can be considered as settled by the common consent of the people, the Legislature and the courts, it would seem to be the fact that secular education is a State purpose, and as such, subject to the control of the Legislature, of the counties and incorporated towns of the State as branches or arms of the State government. The authorities, our own among the number, are all one way.

"It may be safely declared," says Judge Cooley, "that to bring a sound education within the reach of all the inhabitants has been a prime object of American government from the very first. It was declared by colonial legislation, and has been reiterated in constitutional provisions to the present day. It has been regarded as the imperative duty of the government; and when question has been made concerning it, the question has related, not to the existence of the duty, but to its extent. But the question of extent is one of public policy, and addresses itself to the Legislature and the people, not to the courts. And the tendency on the part of the people has been steadily in the direction of taking upon themselves

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larger burdens in order to provide more spacious, elegant and convenient houses of instruction, and to place within the reach of all a *more generous* and useful education. And this is usually done by the direct action of the public; the State or its municipalities constructing and owning the edifices, and supporting the schools, academies, colleges and universities:" Cooley on Tax., 84. A few of the actual decisions of the courts of other States, treating education as a State and municipal purpose, may be cited: *Cushing v. Inhabitants of Newburyport*, 10 Met., 508; *Merrick v. Amherst*, 12 Allen, 500; *Stewart v. Kalamazoo*, 30 Mich., 69; *Horton v. School Commissioners*, 43 Alabama, 598; *Gordon v. Carnes*, 47 N. Y., 608; *Commissioners of Schools v. Alleghany County*, 20 Md., 439; *Bull v. Read*, 13 Grat., 78; *Kuhn v. Board of Education*, 4 West Virginia, 499; *State v. Sickles*, 24 New Jersey, 135; *Marks v. University*, 37 Indiana, 155; *Vanover v. Justices*, 27 Georgia, 354.

The Constitution of this State, adopted in 1834, as well as the Constitution of 1870, contained the following provision, being section 12, Art. xi., of both Constitutions: "Knowledge, learning and virtue being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this government, to cherish literature and science. And the fund called the common school fund, and all the lands and proceeds thereof, dividends,

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stocks and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall be hereafter appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use." The same section of the Constitution of 1870 contains the further provision that the State taxes derived from polls shall be appropriated to educational purposes, and directs that no school established or aided under it should allow white and negro children to be received as scholars therein together.

The language of this section, both in the earlier and later Constitution, plainly shows the intent of the people that the education of the children through a system of common schools should be a State purpose. And the existence of a common school fund at the time of the adoption of the Constitution of 1834, also clearly shows that the Legislature, without any positive constitutional direction, had always considered education, to use the language of Judge Cooley, "a prime object of American government." As soon as the growth of our cities, and the increasing prosperity of the State would justify it, the Legislature began to confer upon the counties and incorporated towns the power

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to establish and sustain, or aid in sustaining, public schools. If the State alone managed the common schools, the richer and more populous counties would bear the larger part of the burden on the entire State, which might be right enough to a certain extent, all parts of the State being interested in the education of the people. But it was obvious that the richer and more populous counties needed greater facilities of education than those afforded by the State, and ought to have the exclusive benefit of the increased taxation upon them rendered necessary for the purpose. No better mode could possibly be devised for attaining these ends than the entrusting to the counties and the incorporated towns, as parts and agents of the State government, the power to organize, support and control the system of public schools within their limits, or to aid the same by taxation. The powers of municipal corporations are usually only parts or parcels of the powers of the State government, entrusted to them for the better security and advantage of the people. The preservation of the public peace is one of the principal duties of the State, yet a part of the duty may, and always has been, entrusted to the local municipalities. The same is true of the creation and keeping up of public roads, and of the preservation of the public health. It seemed to the Legislature, to follow of course, that its power over public schools might, to a certain extent, be entrusted to its counties and incorporated towns. This was done, as we have seen, probably a third of a century ago, in some of our

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more populous incorporated cities. And that the establishment and support of a system of free schools in such cities was a legitimate corporation purpose, was conceded by the counsel, and taken for granted by the whole court, in the case of *East Tennessee University v. Knoxville*, 6 Baxt., 166. And it was expressly decided by the majority of the court to be a county purpose, notwithstanding a doubt expressed by Judge McFarland, in the case of *Waterhouse v. Public Schools*, 8 Heis., 857; S. C., 9 Bax., 398. The opinion of the majority of the court was followed in *Railroad Company v. Franklin County*, 5 Lea, 707, and *Railroad Company v. Marion County*, 7 Lea, 661.

The doubt of Judge McFarland, above referred to, was whether a county or corporation purpose would not, within the meaning of the Constitution as to delegated taxation, indicate a purpose peculiar to the county or incorporated town, not a purpose common to State, county and town. But, as we have seen, the powers conferred upon its arms or agents are usually powers which appertain to the State. And we have a striking instance in the new Code, section 2371, *et seq.*, of the same purpose, being a purpose of State, county and town, to be performed by each at its own expense. The State has a general board of health to prevent the spread of disease; every municipal corporation of a certain population, shall also have a board of health; and each county is required, at its own expense, to take measures to prevent the spread of disease. The purpose may, therefore, be a State, county and municipal purpose,

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but what may be done, and the expense incurred in effectuating that purpose, as well as the benefit obtained, should be confined to the territory and population of the locality. Nor is there anything in the suggestion that the purpose should be one belonging to the county or town from time immemorial, in this State and North Carolina. If usage were the test, we would have to go back to the most liberally endowed municipalities of the mother country. But it is a question for the Legislature to determine what portion of governmental powers shall be conferred upon its municipalities, and these powers must necessarily vary from time to time.

Something is said, both in the bill and in the argument in support thereof, about the act of 1885 violating the Constitution, Article I, section 8, which provides, among other things, that no man shall be deprived of his property but by the law of the land; and section 21 of the same article, that no man's property shall be taken or applied to public use, "without the consent of his representatives," or just compensation. But if the establishment and support of a system of public schools is a corporation purpose, and the act of 1885 was constitutionally enacted by the Legislature, and the ordinance based thereon was properly passed by the municipal authorities, then the property of the complainants taken in the way of taxes to support the system would be taken by the law of the land, and with the consent of their representatives, first in the Legislature and again in the city council.

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It is suggested that the funds to be devoted to educational purposes, beyond those previously appropriated, are limited by the Constitution, Article XI, section 12, already quoted, to the State taxes derived from polls. But the section of the Constitution referred to, expressly contemplates future legislative appropriations by specially mentioning, as prospective additions to the school fund, "all such (funds and other property of every description whatever) as shall hereafter be appropriated." And there is not the slightest intimation in the whole section of any design to limit the legislative power in relation to common schools.

The act of 1885 authorizes the levy by the corporation authorities for school purposes to be made upon "all taxable polls," as well as property and privileges, and the ordinance of the corporation levies the tax accordingly. The bill alleges as a fact, which the demurrer admits, that the corporate authorities had also imposed a tax of one dollar on each poll for ordinary corporation purposes. Some of the complainants, as we have seen, are liable to the payment of these poll taxes. And they insist that the additional poll tax for school purposes is violative of the Constitution, Article II, section 28. That section, after providing for a State poll tax "of not less than fifty cents nor more than one dollar per annum," adds: "Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State." The argument of the complainants is that municipal corporations are limited to taxation on polls not exceeding in any one year the State tax for that year. The

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argument on the other side is, that the Constitution provides that the money derived by the State from taxable polls, shall be devoted to educational purposes. This provision, in connection with the provision limiting the amount of the State poll tax, necessarily limits the State poll tax to a single tax each year, not exceeding one dollar. But, it is said, the poll tax of counties and incorporated towns are not devoted to any specific purpose, and, although limited in any instance to the State tax, may be levied as often as the Legislature chooses to confer the power of taxing for special purposes. And it must be admitted that the Legislature, since the incorporation into the Constitution of 1870 of the limitation on the poll tax, have authorized counties, and perhaps towns, in addition to the usual taxes on property, privileges and polls for ordinary county and corporation purposes, to make a levy of taxes on property, privileges and polls for particular purposes. We have an instance in the Franklin county case cited above. It is probably a continuance of an old usage without properly considering the constitutional restriction. We are constrained to hold that the Constitution in this respect is mandatory, and that no county or corporation can levy a poll tax for any year exceeding the State tax for that year. And that if the defendant corporation had already levied for the year in controversy a poll tax of one dollar for the usual corporation purposes, its second levy of a similar tax for school purposes was unconstitutional and void. The complainants would, in that view, be entitled to perpetually enjoin the col-

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lection of the latter tax. But we are equally clear that the provision of the act is severable, and will not affect the residue of the act, nor the ordinance based thereon. The tax on taxable polls would constitute a very small part of the entire levy authorized for school purposes. And we have repeatedly held that a statute void in part, because beyond the competency of the Legislature as to that part, will be valid in other respects which are severable: *Tillman v. Cooke*, 9 Baxt., 429; *State v. Wilson*, 12 Lea, 246.

The learned and able counsel of complainants make another point on the act of 1885, and insist that section 4 thereof is unconstitutional, and thereby vitiates, as they contend, the whole act. The section mentioned is in these words: "The board of education may permit children living outside of the corporate limits of said town to attend said schools provided for in this bill, by requiring such children, their parents or guardians, to pay tuition to said board of education, the rates and terms of tuition to be fixed by said board, and the money so realized shall go into the school fund of the town; and when any such person living outside of said corporation shall attend, or send to said school, and shall own property in the corporation limits of said town, and shall pay a school tax on the same to said corporation, the board of education may allow credit on the tuition account of such person to the extent of the school tax paid by such person to the corporation the same year that such person shall attend, or send his child, children or ward to said school; but no

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credit shall be allowed to such person on any tuition account for school taxes paid the corporation any other year than that in which such person shall send his child, children or wards to said school, and no credit or benefit shall be allowed any such person for taxes paid in excess of such person's tuition account to said board of education." The argument is, that this section of the act makes the citizens of the corporation establish a system of common schools for children living outside of the corporate limits, which would not be a corporate purpose. But the section in question only permits the board of education to do what they may never in fact do, and is moreover clearly severable from the rest of the act, and might be held void without in the least affecting the substance of the act. The object of the section, moreover, is plainly to benefit the school system by bringing in paying scholars where, in the judgment of the board, it may be done without prejudice to the children of the town. And whether a non-resident tax payer might not be allowed by the Legislature the benefit of the schools to the extent of the taxes paid, just as a non-resident property owner is often permitted to vote in the corporation, might admit of discussion. There is nothing in the objection.

Very earnest and able arguments have been submitted by the learned counsel of the complainants upon the policy of the State, county and incorporated towns being all allowed to tax the citizen for school purposes, thus subjecting him to be thrice taxed for the benefit of education. It has been earnestly insisted

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that the system authorized in this case is not for the best interest of the inhabitants of the town corporation, and works oppressively. But, of course, the courts have nothing to do with the policy of the laws, and cannot interfere merely because in some instances they may work harshly. These are arguments to be submitted to the law-making power, or to the people, to influence them in selecting their representatives, both in the State Legislature and the corporation council. Our duty is limited to pronouncing on the constitutionality of the act. We are expressly forbidden by the Constitution itself to exercise any of the powers properly belonging to the legislative department: Const., Art. II, sec. 2.

Under the rule of decision adopted by this court when a case comes up on demurrer, and repeatedly acted upon (1 Lea, 468; 4 Lea, 249; 6 Lea, 65; 13 Lea, 599), the chancellor's decree will be affirmed, and the bill dismissed as to all the matters of demurrer except the cause of demurrer based upon the alleged fact that the limited poll tax had already been levied for the year before the levy of the school tax. The demurrer will be overruled on that point, and the cause remanded for further proceedings in that regard, unless the parties can agree upon final decree.

The defendants will pay the costs of this court, the costs of the court below to be paid as directed by the chancellor.

TURNEY J., concurs in the conclusions, but does not endorse the reasoning to the broad extent to which it seems to go.

Douglass v. Baber.

ROBERT B. DOUGLASS *et al.*, v. W. H. BABER *et al.*

1. *WILLS. Debts and funeral expenses. Marshalling assets.* A direction by the testator, in the first clause of his will, that his funeral expenses and debts be paid as soon after his death as possible, out of any money he may die possessed of, or that may first come into the hands of the executor, followed by a specific legacy of the testator's personal property, and notes and money, is not such a charge of the debts upon the personal estate as will prevent the legatees from marshalling the assets, and throwing the burden of the debts upon undivided realty.
2. *SAME. Expenses of contest a charge against the estate.* The expenses of a contest over the validity of the will instituted by the heirs, as well as the expenses of administration, including counsel fees, constitute proper charges against the estate, and a legatee whose legacy has been taken for their payment may marshal the assets for his indemnity.
3. *SAME. Marshalling assets. Debts.* The cause of action of a legatee or devisee to marshal assets *accrues* when the property devised is taken to pay the debts of the estate.

FROM SUMNER.

Appeal from the Chancery Court at Gallatin. W. S. MUNDAY, Sp. Ch.

J. J. TURNER for complainants.

SEAY & BLACKMORE, GEO. W. BODDIE and HEAD BROS. for defendants.

COOPER, J., delivered the opinion of the court.

Martha H. Douglass died in May, 1868, having first made a will by which she devised to Martha H. Davis, one of her nieces, certain land, and be-

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queathed to her one-half of her personal property and one-half of her notes and accounts; and also devised to George W. Boddie, one of her nephews, certain other land, and bequeathed to him one-half of her personal property and one-half of her notes and money. The brothers and sisters of the testatrix contested the will by an issue of *devisavit vel non*, which was terminated in favor of the will in May, 1876. In the meantime, an administrator *pendente lite* was appointed, who collected assets and paid debts, and turned the estate over to the executor, who qualified as soon as the will was established. In addition to the property devised and bequeathed by the will, the testatrix owned a one-sixth interest in a tract of land in which her mother had a dower estate, and as to which interest the testatrix died intestate. The mother died shortly after the testatrix, and the co-owners with the testatrix of the dower land, who were also her heirs, by proceedings in the county court, caused the dower land to be sold for partition. In this situation of affairs, on May 30, 1876, the same parties filed the original bill in this cause against the executor of the will of Martha H. Douglass, deceased, the devisee, George W. Boddie, and Evaline Davis, the sole heir of the other devisee, Martha H. Davis, who had died, and others. The principal object of the bill, and the only one now before us, was to settle the rights of the parties to the one-sixth of the fund derived from the sale of the dower estate. The executor of the will of Martha H. Douglass, George W. Boddie, and Evaline Davis, by her general guar-

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dian, answered the bill, and filed the answer as a cross-bill, claiming that the land as to which Martha H. Douglass had died intestate, and of course the fund derived from the sale thereof was *primarily* liable for the debts and liabilities of her estate in exoneration of the real and personal property specifically devised and bequeathed by the will; that the said personal property had been used in the payment of debts and the expenses of the estate, including the expenses of the suit contesting the will, and that the legatees under the will were entitled to marshal the assets as against the heirs of Martha H. Douglass, to whom the undevised land descended, so as to throw the charge upon that land and its proceeds. The chancellor, after ascertaining by a reference to the master, the extent of debts and liabilities paid out of the personal property bequeathed, held and decreed that the legatees were entitled to be re-imbursed the amount thus paid out of the proceeds of the sale of the undevised land. And the Referees have reported in favor of affirming the decree. The complainants except.

The first exception is in substance that the will charges the personal property with the payment of the debts of the estate. The will consists of four separate clauses, designated firstly, secondly, thirdly and lastly. The second clause contains the devise and bequest to the neice. The third clause contains the devise and bequest to the nephew, and the last clause appoints the executor. The first clause is in these words: "I direct that my funeral expenses and all my debts be paid as soon after my death as pos-

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sible out of any money I may die possessed of, or that may first come into the hands of my executor." The proof shows that the administrator *pendente lite* found no money on hand at the death of the testatrix, nor did any money come to his hands not derived from the personal property and notes specifically bequeathed. These facts bring the case precisely within the ruling of this court in the case of *Alexander v. Miller*, 7 Heis., 65, where the will commenced with identically the same clause as the will before us, and where the legatees of specific personalty taken for the payment of debts were held entitled to throw the burden on undevised realty. The opinion in that case rests the decision upon the strict meaning of the word money, which, although the representative of property, is not the synonym of that term. And if the words admit of a broader meaning, they are only the formal mode of expressing the testator's wish that his debts should be paid, which, the authorities agree, will not affect the rights of devisees and legatees. They do not amount to a charge upon the personal estate in exoneration of an undisposed of residuum, or undevised realty. They only express, what would be the law without them, namely, that the personal estate, which is primarily liable for the payment of debts, in the absence of controlling equities, should be so applied as fast as realized. But although thus primarily liable, a legatee thereof would be entitled to go upon undevised realty for reimbursement.

The second, fourth, sixth and seventh exceptions make the point that the allowances to the administra-

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tor *pendente lite* and executor of the expenses of the contest over the will, and the fees of counsel in that suit are not chargeable upon the lands descended. But the expenses of administration, which include the allowances to the personal representative for his own services and reasonable counsel fees for which he is individually liable, are proper charges against the estate, as much so as funeral expenses of the deceased, and a legatee whose personal legacy is made to pay the same may marshal the assets for his indemnity. The fees of counsel employed to sustain the will, it being the duty of the executor to support the will, this court has held to constitute a proper allowance to be paid out of the estate, a decision which, while it may appear harsh in some cases, certainly seems proper enough in this case where the complainants were the cause of the expense. There is nothing in *Porterfield v. Taliaferro*,⁹ 9 Lea, 242, in conflict with this view, for the lands descended are not sought to be reached because the personal estate is exhausted, but because the legatees have the right to throw the burden of the debt *borne* by their legacies upon the undevisee realty.

The third exception raises the question of advancements suggested by the original bill. But, obviously, this is no case where that question can cut any figure. The legatees are not seeking to share in the undevisee land as heirs, in which event alone an account of advancements would be proper. They are asking that the assets of the estate be marshalled, so as to throw the burden of the debts of the estate upon the un-

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devised realty, instead of the property bequeathed by the will.

The fifth exception makes the point that an administrator *pendente lite* cannot pay out funds of the estate, and therefore complainant's exception to the master's report should have been sustained. But we do not find any exception to the master's report made by the complainants on this ground. Besides, the claims which were paid out of the personal assets of the estate have been found by the master and the chancellor to have been just claims, and properly paid.

The sixth exception suggests that the right of action of the legatees is barred by the statute of seven years in favor of heirs: Code, secs. 2281, 2786. The objection assumes that the cause of action originated or accrued in the lifetime of the testatrix. But the right of action of the legatees to marshal assets between them and the heirs did not originate in the lifetime of the testatrix. It only accrued when their legacies were taken to pay the liabilities of the estate. It is not pretended that the bar of the statute has attached since then.

The exceptions to the report of the Referees will be overruled, and the decree of the chancellor affirmed. The complainants will pay the costs of this court. The costs of the court below will be paid as directed by the chancellor.

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JIM BAXTER v. THE STATE.

1. **CRIMINAL LAW. Practice. Issue.** When the record shows the defendant was brought to the bar of the court in custody of the sheriff, was arraigned upon the indictment and plead not guilty as charged, and for his deliverance put himself upon the country, whereupon to try the said defendant upon his plea of not guilty, came a jury of good and lawful men, etc., and duly elected, etc., "to well and truly try" said defendant upon his plea of not guilty to said charge in the indictment, etc. *Held*, that though informal, it showed a substantial issue.
2. **SAME. Evidence. Dying declarations.** When the deceased, a feeble old woman, was violently assaulted, on Saturday night, and was unable to articulate for several days, and on the next Thursday expressed her conviction that she would die, and afterward made declarations as to the identity of the assailant, and lived sixteen days after she was assaulted, it appearing she thought all the time she would die. *Held*, the declarations were competent evidence.
3. **SAME. Practice. Exceptions to evidence must be made in the trial court, and must be specific, or they will not be regarded in the Supreme Court. The rule is the same in civil and criminal cases.**
4. **EVIDENCE.** A party who elicits illegal evidence can not object to it if responsive to the questions.
5. **SAME. Charge of court. Province of jury.** It was not error for the trial judge to instruct the jury that they should give the dying declarations of the deceased the same force as testimony as if she had given her sworn statement in the form of a deposition, if they believed the witnesses' statements as to what she said.

FROM WILSON.

Appeal in error from the Circuit Court of Wilson county. ROBERT CANTRELL, J.

R. E. THOMPSON and J. M. QUARLES for Baxter.
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ATTORNEY-GENERAL LEA and W. H. WILLIAMSON
for the State.

DEADERICK, C. J., delivered the opinion of the court.

The defendant was indicted and convicted in the circuit court of Wilson county, of murder in the first degree, and sentenced to be hung.

He has appealed in error to this court, and has been defended most ably and earnestly.

Several errors are assigned for which it is insisted the judgment should be reversed.

The indictment, in formal language, charges the defendant with the murder of Martha Lane, in said county of Wilson, and the first objection is that the trial was had without an issue. But the record shows that defendant was brought to the bar of the court, in custody of the sheriff, was arraigned upon the indictment, and plead not guilty as charged, and for his deliverance put himself upon the country; whereupon, to try the said defendant upon his plea of not guilty, comes a jury of good and lawful men, etc., and duly elected, etc., "to well and truly try said defendant upon his plea of not guilty to said charge in the indictment," etc.

Then follows the entries respiting the jury, etc., until the verdict was rendered, October 9, 1885.

This, we think, a substantial issue, and the jury were sworn to try the defendant upon his plea of not guilty to said charge in the indictment. It is very manifest, though not in the usual language, that the jury was sworn to try the issues made by the charges

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in the indictment, and the defendant's plea of not guilty thereto. *State v. Smith*, Peck, 131; 13 Lea, 258.

It is also objected that the "dying declarations" of deceased were improperly admitted. The deceased was a feeble old lady, and at the time of the fatal assault, between 8 and 9 o'clock at night, was alone, at her home in Lebanon. She was stricken several blows on the head by a rock, weighing three or four pounds, held in the hand of her assailant, and her skull was badly fractured.

For several days she was unable to give an intelligible account of the assault. Within fifteen minutes or half an hour after she was stricken, neighbors and a physician were at her bedside. Her physician stated that he regarded her wounds as fatal, but at first did not regard the case as utterly hopeless. She was unable to articulate for several days. The blows were inflicted on Saturday night, and on the next Thursday thereafter she expressed her conviction that she would die. She lived about sixteen days after the wounds were inflicted of which she died.

His Honor, when the dying declarations were offered, caused the jury to retire, and then examined some six witnesses, who proved the condition of deceased, and her declarations to them, severally, that she could not recover, and would die.

Three of these witnesses, including her physician, were allowed to prove the declarations of the deceased before the jury. As to these three witnesses, all the declarations proved by them were made after her declarations to them and to others that she could not

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live. To some she said repeatedly in the same conversation, that she could not get well, that she would die, and similar expressions, and never expressed any hope of recovery.

In the case, *Anthony v. The State*, Meigs' R., 265, it was urged, as in this case, that the "dying declarations" were inadmissible upon two grounds, first, because contrary to the bill of rights, and also because there was not sufficient evidence to show that deceased knew or thought herself to be in imminent danger of death. In the case cited, the court says: "The principle asserted in the bill of rights, and that as to the admissibility of dying declarations, are coeval rules of the common law. 'The first was inserted in the bill of rights because it had been maintained with difficulty against the crown, by the popular party. The other had never been debated between them, and hence was omitted.'" The court adds: "That our view of this question is correct, is made manifest by the fact that after more than forty years from the adoption of our first declaration, this argument, against the admissibility of dying declarations on account of its being contrary to the bill of rights, is for the first time made, so far as we are aware, in our courts of justice."

The case of *Anthony v. The State*, was decided in 1838, and for nearly fifty years since our courts have repeatedly recognized it as authority.

The admissibility of dying declarations is one of several exceptions to the general rule rejecting hearsay evidence. They are admitted upon the principle that they are made *in extremis*, when the party is at the

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point of death, and every hope of this world gone, every motive to falsehood silenced, and the mind influenced by the most powerful considerations to speak the truth: 1 Greenl. Ev., sec. 156.

This sense of impending death may be shown by the express language of deceased, or be inferred from the evident danger, or by the opinions of physicians, or other attendants, as in *Anthony v. The State*. It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible: 1 Greenl. Ev., sec. 158. Such are the rules governing such cases, as held by other authors, and by our own and other decisions. Any hope of recovery, when declarations are made, renders them inadmissible.

Tested by these rules, we think the declarations in this case were properly admitted.

But it is objected that parts of said declarations not falling within the rule that the declarations of the deceased are admissible only to those things which the declarant would have been competent to testify, if sworn in the cause, should have been excluded.

This is a correct statement of the rule. Such declarations must speak, in general, to facts only, and not to mere matters of opinion, and must be relevant to the issue: 1 Greenl. Ev., sec. 159.

His Honor, in order to ascertain the admissibility of the dying declarations, in the absence of the jury, examined six witnesses. This has been heretofore held to be a commendable practice in such cases. The defendant, upon the announcement of the court

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that he would allow three of those witnesses to testify as to the dying declarations, excepted to the ruling of the court, without specifying the ground of the objection. The jury was then recalled, and Dr. Kidder, one of the three witnesses, allowed to testify before them, as to dying declarations. He states how, by signs and pointing, the deceased sought to inform him who assaulted her, before she was able to speak so as to be understood; and after he had ascertained the locality indicated by her, and that it was a negro who assaulted her, he obtained the names of several, and their names being repeated to her, she answered no, until defendant's name was given, and then she said, "Yes."

Defendant was arrested and brought into her presence, and she recognized him, and said he was the one. Defendant denied it, and Mrs. Lane replied: "Yes, you did, and you know it." Defendant was then removed, and Mrs. Lane said, "Jim knew he did it. He looked like it."

After a lengthy cross-examination, this recital appears: "Defendant excepted to declaration of Mrs. Lane, as proved by this witness, but the court overruled the exception, and permitted the statement to go to the jury."

It is not seriously insisted that there was any inadmissible testimony by this witness, except the declaration of Mrs. Lane, after Jim left the room: "Jim knew he did it. He looked like it."

Dinah Roberson testified as to Mrs. Lane's declaration that defendant struck her.

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On cross-examination, witness said: Some one asked in presence of Mrs. Lane, if Jim had any folks here, and she replied, "No; he is nothing but a loafer." And at the end of this witness' testimony, a similar objection to that taken to Dr. Kidder's testimony appears.

Mrs. Yeargin, the last of the three, stated that Mrs. Lane told her Jim Baxter struck her, and said, "I wish you had been here Sunday to see Jim Baxter, the one that hit me. He would not look at me."

No exception was taken to the evidence of the witness, and in such case, no exception can be taken to it in this court. The rule is the same in civil and criminal cases: 9 Yerg., 410; 1 Heis., 223; 10 Yerg., 346; 7 Cold., 181-2.

The objectionable evidence in the testimony of Dinah Roberson, was elicited by defendant on cross-examination, and it is equally well settled that a party who elicits illegal evidence cannot object to it, unless it is shown not to have been responsive to the question.

Where the record, or the question itself, shows the answer is not responsive, and is illegal, it may, and should be, stricken out by the court, at the instance of the party examining the witness. But it is otherwise if the answer is elicited by the examining party, and it is not shown to be not responsive, and no motion is made to exclude it on this ground: 2 Swan, 473-4; *Ibid*, 579-80; 7 Baxter, 141-2, and this is upon the presumption in favor of the regularity and correctness of the proceedings below, and upon

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the duty of appellant to put the court in error before he can have a reversal of the judgment. The objectionable part of Dr. Kidder's testimony is, that after Mrs. Lane had told defendant he struck her, and after he had left her presence, she said, "Jim knew he did it. He looked like it." She had just told him he struck her, and he knew it. But, conceding that it would not have been competent for Mrs. Lane to testify in court, if she had lived, what she said after defendant had left her presence, was the refusal of the court to exclude all or any of the declarations proved by Dr. Kidder, upon the exceptions taken, error?

We think not. The objection is general, applying to every declaration proved. Beyond question, nearly all those declarations were strictly admissible. The objectionable part is but an emphatic reiteration of what was properly proved, and is admissible, unless properly objected to.

Mr. Greenleaf says: "It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory: 1 Greenl. Ev., sec. 421.

In a case in 1 Swan, incompetent evidence was admitted without objection; counsel afterward asked the court to exclude *all* testimony as to damages, except for actual expenses, etc. This court said this was properly refused, because the request embraced much competent evidence. This court adds, "If the counsel had moved the court to exclude all illegal

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testimony admitted without objection, during the progress of the trial, the motion would have been more definite and certain, yet still too vague and uncertain to put the court in the wrong. To have this effect, the illegal evidence objected to must be distinctly stated and indicated": 1 Swan, 174, 175.

Here the court was asked to exclude legal and illegal evidence all together, which was properly refused.

In the case at bar, the exception was to all the evidence of deceased's declarations; and this taken at the close of the examination, and no doubt meant chiefly to apply to those declarations which we have held were admissible.

To hold such an indefinite and general objection sufficient to impose upon the trial judge the duty of sifting every witness' testimony, after it is given, to separate a grain of chaff from a bushel of wheat, would be to impose upon the judge the duty of the party, or his counsel. They may admit illegal evidence, if they don't choose to object. If they do not want to admit it, they should object as soon as it is offered, or its illegality appears. At least, if they omit to make objection until the examination of the witness is complete, they should point out the parts of the evidence excepted to, if it is not all illegal, or in some way indicate with reasonable certainty the part objected to.

It is also objected that the court invaded the province of the jury in instructing them as to the *weight* of the dying declarations.

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The court said to the jury, Mrs. Lane's testimony goes to you, through others, and should have the *same force as testimony*, as if she had given her sworn statement in the form of a deposition; that is if you believe the witness' statement as to what she said. The court added: Mrs. Lane's statements are competent testimony, and it is for you to say what credit is due to her statements as detailed by other witnesses.

The court only meant that the declarations were to be received as if sworn to, as a deposition is, and this is just the light in which they are estimated. The witness' apprehension of impending death being equivalent to an oath, and the amount of credit due to them was left to the jury under proper instructions.

It is also insisted that the court erred in admitting Bush's testimony in rebuttal, he not having been under the rule with the other witnesses, although defendant, it is said, insisted that he should be required to retire from the court room while other witnesses were examined. His Honor refused to put this witness under the rule, because his evidence was rebutting, and he was at the time an officer of the court.

It does not appear in this case that any affidavit was made for the rule. But if it had been, it has been held by this court that the right to exclude the witness for disobedience to the order, is within the discretion of the court: 4 Lea, 430, citing authorities. We are of opinion that the dying declarations of Mrs. Lane were properly admitted, and that they fully identified the defendant as the person who

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made the fatal assault upon her, and that in this she is corroborated by another witness to whom Baxter admitted the commission of the crime.

The result is that there is no error in the record for which the judgment should be reversed, and it will be affirmed.

T. C. MIMMS and WIFE v. FINIS EWING *et al.*

TENANCY BY CURTESY. *Adverse possession. Successive tenants.* It is not necessary to show privity between successive tenants if they are connected and continued in fact, each claiming ownership in connection with his possession, to raise the presumption of deed or grant by twenty years' adverse possession. But when a husband goes into possession under his wife's claim of title, and holds under that claim while she lives, and after her death continues to possess and claim in the same right, there is privity between the successive tenants. Adverse holding may perfect title to an estate less than a fee.

FROM MONTGOMERY.

Appeal from the Chancery Court at Clarksville. GEO. E. SEAY, Ch.

HOUSE & MERRITT for complainants.

SMITH & LURTON for defendants.

TURNER, J., delivered the opinion of the court.

In 1854, J. N. Barker, of Montgomery county, gave to his daughter, Delinia, by parol, a tract of

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land. In October of that year, the daughter, with her husband, B. H. Wimberly, moved upon the premises and held and claimed them, under the parol gift, until Wimberly's death, in 1857, when Mrs. Wimberly went to her father's, and Greenfield and wife, the brother-in-law and sister of Mrs. Wimberly, moved to her place.

Mrs. Wimberly intermarried with defendant, Ewing, in 1858, and about the last of that year Greenfield moved off to give possession to Ewing and wife.

During Greenfield's occupancy, he acted and was treated as the tenant of Mrs. Wimberly, and left upon a notice from Ewing that he and his wife wanted possession. A few days after Greenfield's removal, Ewing and wife moved in and lived there until the death of Mrs. Ewing, in April, 1867. During the time, Ewing claimed the land, in right of his wife, and has claimed it since her death, as tenant by curtesy.

Barker promised Ewing, in the early part of 1859, to make a deed to his wife, upon the faith of which, and under the direction of the father, Ewing put valuable improvements upon the land. He has continued to repair and improve, until at least the commencement of this suit, in January, 1879. Barker told Ewing the land belonged to his wife. Barker failed to make the deed to Mrs. Ewing, but after her death, and in November, 1869, he made a deed to complainant, Ella, now Mrs. Mimms, and daughter of Ewing and wife, Delinia. That deed was made without the consent of Ewing, who knew nothing of

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its existence until some time after the death of Barker, in 1873. After his knowledge of the deed, he continued on the land, still claiming it as tenant by curtesy.

The bill is filed to acquire possession of the land and have Ewing account as guardian, etc. Ewing defends upon the ground already intimated. The only question for our consideration is, is Ewing tenant by curtesy, and entitled to the life estate?

He claimed, used, cultivated and improved the land under the facts stated, for about nine years, during the life of the wife, and for about twelve years since he has claimed and used and occupied in furtherance of that right, making a continuous occupation and use by him of nearly twenty-one years. The wife held and claimed, by herself and tenant, about four years before her intermarriage with Ewing, making her adverse claim and possession for a period of nearly thirteen years.

If Ewing may connect his possession and claim with that of the wife, they will make a period of about twenty-four years and three months. If we take out the four years of war, which we do not decide to be required in cases of this character, but leave the question open, it leaves more than twenty years. Can this be done under our law?

In *Mann v. Gilliam*, 1 Cold., 511, approved in *Alexander v. Miller*, 7 Heis., 65, Judge Wright said: "As to the presumption of a grant, deed, etc., upon twenty years' possession, we should have said that, contrary to the instructions of the circuit judge, this

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court at its last term at Nashville, in the case of *John Scales v. Mark R. Cockrill*, held that the presumption arises, although the occupation had been by different persons, and no privity could by any means be traced between the successive tenants, much less is it requisite to establish such privity by deed. That the true principle is, that without reference to the manner in which the respective possessors are connected, or succeed each other, if they are continued and connected in fact, without any *hiatus*, for twenty years, each claiming the ownership in connection with his possession, without regard to the source from which each claims to have derived his title, the presumption will attach. And it follows from this case and the authorities cited, that to create the presumption, it is not necessary that the possession, either in its origin or continuance, should be accompanied by deeds or other writings, and they are only material to extend the boundary when a constructive possession is claimed beyond the actual occupation."

The present case is stronger upon its facts. There was a privity between the claim of the husband and that of the wife. He goes into possession under the wife's claim of title, and holds under that claim while she lives, and after her death continues to possess and claim, in the same right.

A deed to her would have made him tenant by curtesy initiate upon his marriage, and at her death, after issue, born alive, he would have been tenant by curtesy complete, and under such claim, would have successfully defended any action brought to oust

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him of his possession. All that is wanting now to make the defense complete and certain is the deed.

If, then, under the authority cited, a twenty years' possession by different persons, without privity, is sufficient, why is not the possession of different persons with privity, for more than half the time, with a continuation of that possession by one of these persons recognizing the right of the first occupant, and claiming under it, completing the twenty years, sufficient? Here the source of title of the husband is recognized to be the wife—a privity is traced between the successive occupants. We do see the manner in which the respective tenants are connected and succeed each other, and that they are continued and connected in fact, and we have the possessory right of the wife perfected, about six years before her death. Ewing has possessed adversely, continuously, for about twelve years since the death of his wife, and before suit. The husband, having defined the character of his holding, is restricted to it. There is no good reason, we think, why an adverse holding may not perfect title to an estate in lands less than a fee. The defense is made out.

Reverse decree and confirm report.

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15L 673
4pi 614

P. A. OVERALL v. THE STATE.

CRIMINAL LAW. *Occasional insanity.* Where the proof shows the defendant was subject to occasional or temporary attacks of insanity, and was visited by one of such attacks shortly before the commission of the offense, and is not shown to have recovered sanity at the time the offense was committed, the law presumes the insane condition to remain as last shown.

FROM ROBERTSON.

Appeal in error from the Circuit Court of Robertson county. J. C. STARK, J.

A. E. GARNER and L. T. COBBS for Overall.

ATTORNEY-GENERAL LEA for the State.

TURNER, J., delivered the opinion of the court.

The accused was indicted in the circuit court of Robertson county and convicted of mule-stealing.

There was testimony tending to show insanity immediately before, and just after, the commission of the alleged offense.

The court charged the jury: "I am requested to instruct you that if the proof shows that the defendant was insane before he took the mules, that the law presumes that this state of mind existed till the proof shows the contrary to appear. Upon this subject I instruct you, that if the proof shall show general insanity existed in the defendant before he took the

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mules, then this condition of mind will be presumed to continue until the contrary appears, and the same is true of partial insanity upon particular subjects, but the character of insanity which the law will presume to continue when once shown to exist, seems to be of an habitual and permanent character, and not merely occasional, or of a transitory and tentative character."

This was error. It is the rule in all cases, that insanity, or other condition of mind or body once shown to exist, is presumed to continue until the contrary is made to appear by proof. If the accused was subject to occasional and temporary attacks of insanity and was visited by one of such attacks shortly before the commission of the offense, and is not shown to have recovered sanity at the time of alleged wrong, the law presumes his insane condition to remain as last shown.

There is no reason why the presumption shall not apply to periodical lunacy, as well as to habitual or permanent derangement, or that an offense perpetrated by one temporarily insane should not be inquired of by the same rules of law and evidence as one perpetrated by an individual permanently and hopelessly insane. The question is, was the supposed perpetrator insane at the time of the act done? without regard to whether the insanity was occasional, or periodical, or permanent, or by what causes produced, so that it was such insanity as deprived its victim of capacity to purpose a violation of legal obligation, or to have had, in the act committed, a criminal intent.

Reverse the judgment.

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GEORGE JENKINS v. THE STATE.

CRIMINAL LAW. *Abducting a female.* When defendant is indicted under the Code, section 5370 (M. & V.), for abducting a female, if the proof shows that the female was unchaste and lewd, the defendant can not be convicted.

FROM TROUSDALE.

Appeal in error from the Circuit Court of Trousdale county. N. W. McCONNELL, J.

W. M. HAMMOCK for Jenkins.

ATTORNEY-GENERAL LEA for the State.

COOKE, J., delivered the opinion of the court.

George Jenkins was indicted in the circuit court of Trousdale county, at the August term, 1885, of said court, under sec. 5370 of the Code (M. & V.), for abducting one Lizzie Scruggs, a female, from her mother, having the legal control of her, for the purposes of prostitution and concubinage. He has been tried and convicted, and his punishment fixed at ten years in the penitentiary, and has appealed to this court.

The proof shows that said Lizzie's home was at her mother's, but that she was in the habit of going where she pleased and hiring herself out to work for whomsoever she pleased, by her mother's consent. That she had hired herself to the defendant in the

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summer of 1885, to wait on his wife, and in July last she and the defendant went off together into the State of Kentucky, and were gone seven days before they returned, and she testifies that they had been in the habit of having sexual intercourse together before they left, and continued their illicit intercourse during their absence. The age of said Lizzie does not very satisfactorily appear. Her mother says she was seventeen years old, and a witness, Woodmore, testifies that he has known her since the close of the late war, and that she was then a little girl running round. But it is abundantly shown by the testimony of numerous witnesses that she is, and was, long before she went to live with the defendant, of notorious bad character, not only for want of chastity, but that her general character was bad, and that she is not entitled to credit upon her oath. As to this, there is no countervailing testimony attempted to be offered, and there is no question but that she had the character of and was a public prostitute before she went to stay at the house of the defendant. The testimony shows that she had permitted indecent liberties to be taken with her by other men, and that she had endeavored to induce another man to go off with her about a year before she and the defendant went away together.

While her mother testifies that she did not give her consent to her going away with the defendant, she states that she knew of it, either the day they left or the day after; that she made no effort to have her reclaimed or brought back, and that she had

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offered to dismiss, or, in her own language, to "sell out this prosecution for one hundred dollars."

The court, among other things, charged the jury that "the fact that Lizzie may not have been virtuous at the time she was abducted, if abducted at all, will not excuse the defendant. The statute does not say the offense can be committed only on a virtuous female." And again he says in his charge, "It is not a question of which one may have seduced the other. It is enough that they go together without the consent of the mother, and in violation of her legal control." These charges, we think, are very clearly erroneous.

The section of the Code under which the indictment is found, is as follows: Any person who takes any female from her father, mother, guardian, or other person having the legal charge of her, without his or her consent, for the purpose of prostitution or concubinage, shall, upon conviction, be imprisoned in the penitentiary not less than ten, nor more than twenty-one years."

The object which the Legislature had in view in the passage of this very highly penal statute, was for the purpose of preventing the taking or enticing innocent and virtuous young females away from their parents, guardians, etc., for the purpose of making them prostitutes or concubines. We can not conceive that the Legislature could have had the purpose of visiting such punishment upon a person who merely goes with a prostitute, by an arrangement which, it may be, was contrived and proposed by her, to some place where

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they can more conveniently indulge in illicit intercourse. And this, under the above charge, would be all that was necessary to constitute this offense, and we hold, that such is not a proper construction of the section of the Code above cited. There can be no question, from the testimony in this record, that the mother was fully aware of the lewd character of the daughter, and by her own testimony permitted her to go where she pleased and hire to whom she pleased.

The facts of this case, reprehensible as the conduct of the defendant was, do not constitute the offense of abduction, for which he has been convicted, and he was entitled to a new trial in consequence of the insufficiency of the evidence to sustain the verdict.

For the errors in the charge above specified, as well as the refusal to grant a new trial, the judgment must be reversed and another trial awarded.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILROAD
COMPANY v. J. C. JOHNSON.

1. PRACTICE AT LAW. *Continuance.* Where at the eighth trial term the affidavit for continuance by plaintiff in error stated that until recently the absent witness had been in a certain place in the State, and it had taken out subpoenas for him and had sent them to the counties in which it supposed he might be found, and had just learned he was in the State of Texas, and it was not shown that any effort had been made at any previous time to procure the attendance or deposition of the witness, and it appeared the company knew all the time the materiality of the facts it alleged it could prove by him, he being the engineer on the train to which the accident occurred, it was not error to refuse the continuance.

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2. *SAME. Evidence.* In a suit against a railway company for damages to a passenger, for negligence, and unsafe condition of the cars, road-bed, rails, cross-ties, etc., it was not error to allow proof by the defendant in error as to the condition of the track for a short distance on either side of the place of the accident; and it is competent to show that the section boss permitted part of his road to be in bad condition, in determining his negligence and want of skill.

FROM HUMPHREYS.

Appeal in error from the Circuit Court of Humphreys county. JO. C. STARK, J.

EAST & FOGG and H. M. MCADOO for Railroad.

BATE & WILLIAMS and T. L. LANIER for Johnson.

TURNER, J., delivered the opinion of the court.

This action was brought in the circuit court of Humphreys county, at July term, 1877, to recover damages alleged to have been sustained by the plaintiff, a passenger on the cars and road of the defendant, through the negligence, carelessness, and want of skill in the management of the road, and the *unsafe* condition of cars, road-bed, cross-ties, rails, engines, etc.

After several continuances by consent, and one by the company, the case was tried at July term, 1880, and resulted in verdict and judgment for five thousand dollars.

The first assignment of error is the refusal of the court to continue the case on application of the company, supported by the affidavit of H. T. Cummins as to the materiality of facts that could be proved by Henry Burke. The affidavit states that till recently

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Burke has been in Nashville. Defendant has taken out subpoenas for him, and had them sent to the counties in which it supposed he might be found, and has just learned that he was in the State of Texas, etc.

It is not pretended that any effort had been made at any previous time to procure the attendance or the deposition of the witness. The application was made at the eighth trial term. Burke was "until recently" in Nashville, within jurisdiction of the court. The company knew all the time of the materiality of the facts it alleges it can prove by him. He was an engineer on the road, and alleged to have been the engineer on the train to which the accident occurred. At the November term, 1879, the cause was continued by the company for witnesses whose affidavits appear in the record, and whose testimony, as appears from their affidavits, was substantially, in every material point, the same as would have been that of Burke.

As the bill of exceptions is an agreement of the tendency of the proof submitted by each side, and embodies in effect the character of proof the company claims it could make by Burke, we conclude the witnesses mentioned in former affidavits were examined on the trial.

The negligence in failing in the three years to summons the witness, or take steps to procure his testimony, and the apparent fact that such testimony would have been cumulatives, preclude the company from making complaint of its want. It was no error to refuse the continuance.

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It is next urged that the court erred in allowing proof of the bad condition of the road in the vicinity of the point where the accident occurred. The bill of exceptions recites: "Witnesses were allowed to state, over defendant's objections, the conditions of the rails and cross-ties, stating they were bad in that part of the road near to where the rail *broke* and the accident occurred, and which did not give way or break, and this for a hundred yards or more on either side of the accident."

"The engineer, Col. Morris, was on cross-examination allowed to say, over defendant's objection, that the whole road was not in first-class condition, as compared with the best roads in this country and England and Europe."

The section boss was permitted on cross-examination, after testifying that "the part of the road where the accident occurred was in good condition," to say, over the objection of defendant, "that some parts of his section were in bad condition—not in first-class condition—and needed repairs, but not that part where the accident occurred."

The declaration contains the general averment that the road was out of repair. The proof is confined to the section on which the accident happened, and involves the further averment of negligence and want of skill of the employes of the road. The proof tended to the establishment of both facts, and furnished such facts and circumstances as the jury might look to in its effort to arrive at truth. The fact that the *overseer* or boss was guilty of neglect of duty, and

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of permitting his part of the road to be in bad condition in some parts of it, was a legitimate item of evidence to which the jury could properly look in determining the question at issue of his negligence or want of skill, for such is the charge, and all proof tending to establish it was competent. For stronger reasons, the proof that the rails and cross-ties were bad for a hundred yards or more on either side of the accident, was competent. Such proof is *bringing* out, almost directly, that at the point of accident the road was unsafe and unfit for travel.

This answers the objection that the engineer was permitted to prove the whole road was not in first-class condition; the statement embraces the point of accident. The well-settled rule in this State is, that railroad companies are required to keep their machinery, roads, road-beds, etc., in repair and condition up to the best state of the art in such things.

The section master was permitted, over objection, to state that he "might have said, but did not remember, to some persons after the accident, and after he had been discharged, that that part of the road where the accident occurred was in bad condition, that the company would not furnish him *iron* and cross-ties; and to McKelvy, several times he might have said, but did not remember, that his section was in bad condition, and that the company would not furnish him iron and ties to keep it in good condition."

These statements of the witness are not attempted to be contradicted, and of themselves prove nothing,

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and could have no influence on the jury in any sense, and there is no reversible error in their admission. Even if the persons in whose presence and the times and places when and where the statements were made, if at all, had been mentioned, the plaintiff could not have introduced the proof of them with a view to impeach the credibility of the witness, and could only have done so to show uncertainty of memory. With the latter object the questions were legitimate, though the answers could be worth very little, if any thing. Even if there were error in the rulings of the court, it was such as worked no *hurt* to the railroad company, as the bill of exceptions says: "It is conceded that the testimony was sufficient to sustain in the Supreme Court the finding of the jury that the accident was the result of negligence on the part of defendant in not having a sufficient road *at the place of the accident.*" So that, whatever may have been the testimony as to the condition of the road elsewhere, and however incompetent the proof as to it may have been, the defect at the point of accident was its cause, and for that the jury gave the damages, which are not claimed to be excessive, and of course were not aggravated by the objectionable matter. The charge of the court is in substance the language constantly employed by circuit judges, and repeatedly approved by this court.

But even if we should hereafter conclude to go a step farther, and require a definition of the "relative" and "comparative" terms, "highest," "greatest," and "utmost care and skill," such step is not

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called for here, the concession showing that there was sufficient proof of negligence to sustain the finding of the jury. Report confirmed.

Judgment affirmed.

15L 683
4pt 596

GARTH, BUCKMAN *et al.* v. J. W. FORT *et al.*

1. DEED. *Feme covert. Privy examination.* If proper privy examination was made and an improper certificate made by mistake, same may be corrected; but if proper examination was not made, it cannot be cured. It is not incompetent for the officer to testify that the proper privy examination was not taken.
2. SAME. *Husband and wife.* If husband attempt to sell his wife's land, same is void, and the purchaser, if put in possession, is at most but the tenant of the husband, whose entry and possession is not a disseizin of the wife, if it is of the husband. In such case the *bona fide* purchaser is entitled to compensation for permanent improvements made before the filing of the bill to set aside the conveyances to the extent the value of the land is enhanced at the time of the surrender of possession, and will be charged with rents from the death of the husband, but is not entitled to lien on the land for purchase money paid the husband.

FROM ROBERTSON.

Appeal from the Chancery Court at Springfield.
GEO. E. SEAY, Ch.

T. L. YANCEY, QUABLES & DANIELS and GARNER
& GARNER for complainants.

J. W. JUDD for defendants.

Garth and Buckman v. Fort.

TURNEY, J., delivered the opinion of the court.

In August, 1867, J. B. Fort died intestate, in Robertson county, leaving four children, viz: J. W. and J. H. Fort, Mrs. Garth and Mrs. Ligon. The children agreed to partition the lands, and on December 4, 1867, a deed *inter partes* to that end was prepared and purports to have been acknowledged by Mrs. Garth and Mrs. Ligon, on December 20, 1867.

Mrs. Ligon lived in Montgomery county; Mrs. Garth in Robertson. The other parties acknowledged the deed at different times.

It is claimed that on January 11, 1868, S. M. Ligon, with his wife, conveyed the parcel of land allotted to her, to J. W. Fort. The deed purports to have been acknowledged on privy examination by Mrs. Ligon, on April 23 or 25, 1868.

Mrs. Ligon died in 1871. Ligon died since the case was appealed to this court.

The children of Mrs. Ligon filed this bill in February, 1876, to stay waste, remove cloud, etc., making their father and the purchasers of the land defendants.

The clerk of the county court of Robertson county appointed W. R. Saddler, a justice of the peace for that county, to take the privy examination and acknowledgment.

The first question to be answered is, was the privy examination, etc., had in Robertson county? Upon this inquiry the proof is quite conflicting, respectable and credible witnesses testifying on each side of the issue.

It is admitted that Saddler took the acknowledg-

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ments to both deeds—one at his own home, and the other at the home of Mrs. Ligon; that he was sick at home when he took one of them, and Mrs. Ligon sick at her home when he took the other, but it is controverted which.

The witnesses being equally credible, we must look to such circumstances as tend to strengthen the one side or the other. The attending physician proves that Saddler was sick, and that he visited him at his house on December 20; that he was his regular physician, and visited him in January, February and August, 1868; that during that and the preceding year he visited other members of Saddler's family; that his books show the times of his visits, and to whom made.

S. M. Ligon, the husband, says: "I kept a diary, generally as a farm diary, which enabled me to recollect and fix dates," and has it with him. The memoranda were made at the time, and are true. He says, Mrs. Ligon had an attack of apoplexy on the morning of January 4, 1868, and was never well afterward; at the time the deed to Fort purports to have been acknowledged, Mrs. Ligon was at home? one of her children (Matt.), was very sick; that Saddler came to his house about April 25 for the purpose of taking the acknowledgment, and said he came at the request of Fort; that Dr. Beaumont visited the child on April 23; Mrs. Ligon went to E. A. Fort's, which was in Saddler's neighborhood, on the 16th and returned December 17, 1867; Mrs. Ligon was in bed at the time of acknowledgment; *she was feeble,*

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mentally and physically, if not insane, after the attack, and was never left alone.

These facts are corroborated circumstantially by others who were about the house or of the family, at the time mentioned, and we think show satisfactorily that Saddler took the acknowledgment to the partition deed at his home while he was sick, and to the Fort deed at Mrs. Ligon's home, in Montgomery county, when she was sick, and if so, the latter is void.

We next inquire, was the privy examination as required by law? The certificate by the commissioner is that he has "taken the examination of Mrs. S. C. Ligon separate and apart from her husband as to her free—in signing the above deed. This, April 25, 1868."

At the January term, 1876, of the county court, under proceedings for the purpose, the certificate was made to conform to the statute. This would do, provided the examination was properly taken, but an improper certificate made by mistake. A proper certificate cannot cure an imperfect or insufficient examination.

The commissioner is examined, and says Mrs. Ligon did not read the deed; he did not read it to her; that he supposed she understood what she was about; had but little conversation with her; did not have the statute before him at the time, but wrote from memory; that when the amendment proceedings were being had he had no more distinct recollection of what had passed than he now has.

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If the commissioner wrote, as he says, from memory, we must presume that he examined in the same way, and that his memory was no better when he examined than when he wrote, especially when the two constitute but one act. The guard thrown around the married woman by the law, requiring the privy examination, is intended to furnish her the means of information necessary to a perfect understanding of the act she is called on to perform, and to protect her against her own ignorance of what may be the legal effect of her act, as well as against the superior knowledge, cunning and undue influences of others. Each of the qualifying words in the statute is essential to the validity of the deed of a *femme covert*. The absence of any one of them vitiates the deed. Such defects and omissions cannot be cured by subsequent amendment, however solemn, formal and free.

To the objection that the commissioner cannot be examined to impeach his official acts, there are two answers: First, he was called by the objecting party, and second, any evidence going to show a want of the invalidity of the privy examination is competent, and we know of no rule excusing an officer from stating such facts as will go to show a failure on his part to do his duty. The objection is made for the first time in this court, and could not avail any way.

The defense of the statutes of limitation of three and seven years, cannot avail under the construction given to the act of 1849-50, Code, 2481. In *Lucas v. Rickerich*, 1 Lea, 728, this court says: "In *Cole-*

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man v. Satterfield, et al., 2 Head, 264, this statute is correctly stated to have changed the common law by forbidding the sale of his (the husband's) interest during her (the wife's) life for his debts, and also disables the husband from selling such interest unless she joins in the conveyance. This, we have several times held, was the only effect of the statute, and that it did not create a technical separate estate in the wife. This being so, it follows, the rights of the husband as to rents and profits are not affected by the statute, and remain as before its passage."

If we adhere to this interpretation, it must result, that in order to secure the rents and profits, the husband must, of course, control the use and occupation, and that he is also, during the life of the wife, tenant by curtesy initiate, and upon her death, after issue born alive, he is tenant by curtesy. To them it must also result that while his attempt to sell is void, still if he put the purchaser in possession, that purchaser is his tenant, whose entry and possession is not a disseizen of the wife, even if we should hold it a disseizen of the husband, which I think it is not, but as the sale is void, he is a tenant at will, or at most, from year to year, of husband and wife. However this may be, the husband, being entitled as already defined, may put him in possession, and he holds alone under the husband, and only such interest as the husband had, and cannot be disturbed in his possession by the heir of the wife, as such, until the death of the husband, who having died after the wife, and since the commencement of this suit, no statute

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interferes with the rights of complainants, who had the right, as they have prayed, to stay waste, to remove cloud," etc., during the life of the husband, and to have their rights ascertained.

Under the rules, several times announced by this court, the defendants are entitled to compensation for such *permanent* improvements as they may have placed upon the land before the filing of this bill, the value to be fixed at the time of the surrender of possession, and to be estimated for their enhancement of the value of the real estate at that time. They will account for rents from the death of Ligon. *They are not entitled to a decree or lien for the purchase money paid to Ligon. Complainants are guilty of no fraud; they nor their mother received any of the purchase money. The defendants acquired no more than Ligon's interest. They have the covenant of Ligon, and must look alone to it.*

Decree reversed. Exceptions to report allowed. Decree here for complainants, with costs, and cause remanded.

Upon petition to re-hear, TURNER, J., said:

Two objections only are presented by the petitioner to the opinion of the court.

First, that it holds Mrs. Ligon to have been insane at the time of the execution of the deed and her privy examination.

Second, the refusal to give lien for the purchase money paid.

The only allusion in the opinion to the insanity,

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is the statement that after an attack of appoplexy on January 4, 1868, she was feeble, mentally and physically, if not insane. It was not intended to decide the question one way or other.

It was deemed unnecessary to do so, as we thought the other questions decisive of the case.

A careful examination of the testimony of these witnesses, upon whom it is relied to disprove the allegation of insanity, shows that they are speaking of a time anterior to the attack of apoplexy in January, 1868. That is, while they think it was in April of that year, it has been determined that they were mistaken as to the deed of which they speak, it being the deed of partition instead of the one now involved, and the time about December 20, 1867.

Quite a number of witnesses speak of the mental condition of Mrs. Ligon after the attack, and state facts showing conclusively that at the time of her privy examination in April, 1868, she was mentally incapable of any business transaction. As it is not now insisted that there is error in the opinion in holding the privy examination to have been attempted in April, the testimony of the condition of Mrs. Ligon's mind at former periods does not impair in any way the testimony covering the period between January 4, and April 25, 1868, and on to January, 1871, when she died a "raving maniac."

Our statute requires that the officer taking the privy examination shall, before certifying, be satisfied that the deed is fully understood by the wife: Code, 2891, M. & V.

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We have already determined, and it is not now controverted, that there was no privy examination in fact. Under the condition of Mrs. Ligon there could have been none.

It has several times been said by this court that for want of privy examination the wife's deed is absolutely void, and does not estop her: *McCallum v. Pettigrew*, 10 Heis., 394, and authorities cited.

For stronger reasons, if the wife is insane, she will not be estopped, nor in any manner prejudiced, even though there had been the formality of privy examination. No declaration of Mrs. Ligon prior to the time of the attempted privy examination can affect her rights.

Upon the second question we have been referred to numerous authorities, none of them with facts like the present case. Here the wife was stricken with apoplexy on January 4, and it was thought would die. On the next day her husband and brother were negotiating the sale and purchase. On the 11th the papers were drawn and signed; the notes were made payable to the husband. Mrs. Ligon was very ill. Nothing was said to her by her brother about the trade. The purchase price was paid to Ligon, some in money, some in check, and some in claims on heirs of Joel Fort, deceased. No part of it was paid or offered to Mrs. Ligon, nor was she in any manner consulted about its payment. No part of it was ever applied to her use or invested for her benefit. That some of it may have been paid in her presence avails nothing.

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She was in the condition of a stranger to the transaction from beginning to end; did nothing and could do nothing to estop her or prejudice her rights. Her relation to the whole affair, in law and in fact, is as if an effort had been made by an entire stranger to her, and in her absence, to convert her estate.

If a sane wife is not estopped by her deed for want of privy examination, by what rule are we to estop one who is incapable of attention to any business transaction?

There is not even a pretense that any act of hers induced her brother, the purchaser, to accept the deed, execute his notes and pay them to the husband. He was in good health and of sound mind; she in bad health, with a mind paralyzed by apoplexy, growing worse daily, until she died a "raving maniac."

None of the requirements of the law necessary to deprive her of title have been observed.

To hold that her estate is liable to repay the purchase money would be to put it in the power of every purchaser to defy law and absorb estates of married women, whether sane or insane. If to relieve her works a hardship, it is a hardship brought about by the purchaser. He had every opportunity to know what he was doing and the chances he was taking, and must abide the results of his venture. It is claimed he was guilty of no fraud, nor was his sister, nor are the complainants, and being equal in this respect, the law must prevail. In the absence of positive fraud the parties would not occupy equal grounds. The purchaser, over every opportunity to

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know the facts, negotiated and traded with the husband, without consultation with the wife at the time the law demanded he should, in order to protect himself. To say the least, his conduct was culpable.

At the time the papers were signed, he said nothing to his sister on the subject. Her husband asked her if she was willing to sell the land; she said to him, "Do as you please with the land," that she had nothing to do with it. The husband says he thought her signature was only a formality. The brother knew of her condition on January 4 and 11, was at her house on both days. All his conduct goes to prove that he cared nothing for her signature, that he too thought it a mere formality, and therefore ignored her in his negotiations to their consummation with the husband.

Whilst the family was attempting to conceal the derangement of Mrs. Ligon, it was talked of in the neighborhood and reported through the country.

E. J. Fort, the uncle of the purchaser, who told him about the negotiations, told his nephew "when the papers were being drawn up to be very particular and have everything done according to law, lest his title be disturbed on account of the rumors of the derangement of Mrs. Ligon's mind." E. J. Fort had heard of it some time before he heard of the negotiations for sale and purchase.

Dismiss petition.

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SAWYERS, CARTWRIGHT and PETE v. THE STATE.

1. **CRIMINAL LAW. Evidence.** A defendant, under indictment for a criminal offense, may prove that another person had a motive, or ground for a motive, to commit the offense with which he is charged.
2. **SAME. Res gesta.** When the State proved that one of the defendants was seen on the morning of the day of the homicide going in the direction of W.'s, and was afterward seen returning with another of the defendants riding behind him, the defendants may prove as a part of the *res gesta*, the declarations of said defendants, made at the time, explanatory of their conduct.
3. **ALIBI.** It was error for the circuit judge to charge the jury that if the proof of an *alibi* was false, the presumption was that the evidence of the prosecution was true.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. MATT. W. ALLEN, J.

N. N. COX, JNO. V. WRIGHT, MOSES R. PRIEST and SP'L HILL for Sawyers, Cartwright and Pete.

ATTORNEY-GENERAL LEA and W. T. TURLEY for the State.

TURNEY, J., delivered the opinion of the court.

The accused were indicted for the murder of James Carter. The proof is altogether circumstantial. Two men were convicted of murder in the second degree, and one of manslaughter.

The State was permitted to show, over the objections of defendants, that the deceased had instituted a prosecution against Sawyers for a felonious assault, said to have been committed several months before the homicide, as tending to show motive on the part

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of Sawyers. The defense offered to prove that deceased had instituted criminal proceedings against two other persons for robbery, which was rejected on objection of the State. It is a rule of law that the guilt of the accused must be made out to the exclusion of every other reasonable hypothesis. If there is proof in the possession of an accused tending to show that another had the motive, or was in condition to be acted upon by causes which might produce the motive to commit the offense, such facts may be shown as items of proof tending to establish a motive in the breast of such other person, and to that extent prove the existence of an hypothesis inconsistent with the guilt of the prisoner, the value of such evidence to be determined by the jury, who should give to it any such weight as its surroundings might justify.

The testimony should have been admitted.

The State proved that Sawyers was seen on the morning of the day of the homicide going in the direction of Waller's, and was afterward seen returning, with Cartwright riding behind him. The defense offered to prove the declarations of Cartwright and Sawyers, made at the time, explanatory of their conduct; this was rejected.

The declarations were parts of the *res gestæ* and should have been admitted, their value to be ascertained by a consideration of all the evidence.

The court charged the jury, "If the proof of an *alibi* being true, would work a complete destruction of the charges against the defendants, should turn out

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to be false and manufactured, the legal presumption is, that the evidence introduced by the State, and upon which it bases a claim for the conviction of the defendants, whether weak or strong, is true."

This was error. The only effect such a state of affairs as that presented in the charge of His Honor could have upon the testimony of the State, would be to leave it unimpeached by the attempted or false and manufactured proof of an *alibi*, and to be considered and weighed by the jury in its deliberations upon its own strength and value. If of itself insufficient to warrant a conviction, or should bear internal evidences of falsehood, or its credulity has been impeached by more or equally reliable testimony, or by testimony creating doubts of its trustworthiness, such defects cannot be supplied or cured by the failure to sustain the defense of *alibi*. It does not follow that, because the defense has offered to sustain itself by falsehood, the prosecution has not. While the law presumes every man to speak truth, yet if that presumption be removed, it does not deprive the party of showing from itself or otherwise, that the proof of his adversary is insufficient or untrue. The jury may look to the attempt and failure to prove an *alibi* as a fact against the defendant, weak or strong, as justified by the surroundings, but not as rejecting a legal presumption of the truth of other proof against him.

Other errors are suggested in argument which we deem unnecessary to be noticed, as the judgment must be reversed for the reasons stated, and the cause remanded for another trial.

The State, etc., v. The Mayor, etc., of Nashville.

THE STATE *ex rel.*, T. A. KERCHEVAL v. THE MAYOR
AND CITY COUNCIL OF NASHVILLE *et al.*

1. CORPORATIONS. *Ultra vires.* The charter of the city of Nashville, providing the compensation of the mayor shall be \$2,400 per annum, and may be changed by ordinance, but not during his term of office, an ordinance of the city council providing that after the expiration of the term of the *then* mayor, the mayor shall serve without compensation, was *ultra vires* and void.
2. SAME. *Estoppel.* The mayor elected after the passage of said ordinance was not estopped from claiming salary by the fact that he knew of said ordinance abolishing the salary, nor by any statement he may have made to the electors while a candidate, that if elected he would serve without compensation. A promise by a candidate to serve if elected without compensation might be a ground for his removal, but will not estop him from claiming the salary of the office.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

JOHN RUHM and SAMUEL WATSON for Kercheval.

J. C. BRADFORD and A. S. COLYAR for Nashville.

COOPER, Sp. J., delivered the opinion of the court.

The relator in this case, T. A. Kercheval, is the present mayor of the city of Nashville. He seeks, by *mandamus*, to compel the city council to place the amount of compensation, or salary, claimed by him as mayor for 1886, in the budget for the expenses of the city for said year; and also to compel the comptroller of the city treasury to place his name on the

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list of the city creditors, and to issue warrants on the city treasurer for the amounts claimed to be due him as mayor for October and November, 1885.

His Honor, the circuit judge, was of opinion that the relator was entitled to the relief sought, and directed peremptory writs of *mandamus* to be issued accordingly. From this judgment defendants, or some of them, have prosecuted an appeal in error to this court.

The record indicates that the relator was elected mayor of Nashville on October 8, 1885, and inducted into office on the 13th day of the same month. It was suggested in argument, by defendant's counsel, that the proceedings in the court below were in some respects irregular. But it is sufficient to say, as to this, that the course pursued in that court was in substantial compliance with the practice approved or suggested, in the case of *The State ex rel., v. Board of Inspectors*, 6 Lea, 18.

The real grounds of defense relied upon in the demurrer and answer, are these: 1. That the city council, by ordinance adopted in May, 1885, declared that upon the expiration of the term of office of the then mayor, that the mayor of the city should not receive any compensation, that this ordinance is valid, and therefore the present incumbent is not entitled to any compensation. 2. That if this ordinance is for any reason invalid, still the relator is estopped from claiming and receiving any compensation, because in his canvass for said office he declared that if elected he would not claim any compensation for his services as

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mayor. The determination of these questions decides the controversy. As to the first of these questions, on March 21, 1883, the Legislature of the State passed an act (the same being approved March 26, 1883), which repealed the charter of the city of Nashville, said act taking effect on the second Thursday of October, 1883. On the same day the Legislature passed another act, (which was approved March 27, 1883), providing "for the creation and organization and defining the powers of municipal corporations embracing territories of cities having a population of 36,000 and upward, according to the federal census of 1880, whose charters have been abolished." This act also took effect on the second Thursday of October, 1883, and under it the present city government of Nashville is organized, and had its birth at an election held on the day the act went into effect. An examination of the provisions of this act is necessary to the determination of the validity of the ordinance already referred to. Indeed, an inspection of the entire act is needful to obtain a just comprehension of its intention, spirit and purposes. It has been argued for the defendants that this act is a general law, and that it should not be tested by the same rules of construction that are applied to special charters. To this view we cannot accede. While the act is, in one sense, a general law, it is, for all practical purposes, the charter of Nashville, and is so designated in the city code recently compiled. It is the grant of power. From it the city government derives its life and vigor; and to its restrictions and

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limitations the municipality is subject. Under this grant of authority, the agents and officials of the city have no more power than they would have if it were a special charter instead of a general law, and as to the rules of construction of special charters there has been no contention in the argument.

By the terms of this charter act a city council of ten members is provided for, and the powers of this council are largely, if not chiefly, legislative in their character. It also provides for a mayor, whose duties are chiefly, but not wholly, executive. The act further provides for the creation of a board of public works and affairs of three members, and the duties of this board may be said to be chiefly administrative. So the act fairly divides the city government into three departments, and these may be conveniently classified as the legislative, executive and administrative departments, and in the act the rights and duties of each are specifically pointed out.

The judicial department of the act treats as a subsidiary matter.

The system of city government devised by this charter act seems to have been thoroughly considered, and there appears to be no good reason why, in practice, it should not prove to be a successful form of government. There are thus three departments, all important and each having its sphere of action, and the checks and balances provided for are well suited to prevent mal-administration. As said, the powers of each department are designated, and one is not allowed to encroach upon the domain of the co-ordi-

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nate departments. Such is the general scope and purpose of the charter act, and the intention of the Legislature, as to the powers of the co-ordinate departments, seems to be clearly manifested.

Sections three to eight, both inclusive, relate to the city council, and the last sentence of section eight of said charter act, is this: "*Councilmen* shall receive no compensation." Here it is clearly expressed that the city's officers in this department of the government were to serve without pay. Whether this provision is a wise one experience alone will demonstrate. But the duties of the council, while important, are not necessarily onerous, after the government is once fully organized and a system of ordinances adopted. A majority make a quorum for business, and hence, by arrangement, each councilman can be absent from four-tenths of the meetings of the council if he so desires.

The ninth section enumerates many of the duties of the mayor, and near the end of that section occurs this clause: "The compensation of the mayor shall be \$2,400 per annum, and may be changed by ordinance, but not during his term of office." The twenty-sixth and twenty-seventh sections of said act provide for the election of the board of public works and affairs by the city council, their qualification, etc., and the twenty-eighth section, is this: "That the members of said board of public works and affairs shall devote their time and attention to the duties of their office, and shall not engage actively in any other business. The compensation of said board of public works and affairs shall be fixed by the mayor and

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city council prior to their election; *Provided*, that the amount of such salaries shall be uniform and subject to such change as the mayor and city council may, from time to time, in their judgment, expressed by city ordinances, deem advisable, and their salaries shall not be changed during their term of office."

The ordinance adopted in May, 1885, by the city council, is in these words: "After the expiration of the term of the present mayor of the city, the mayor shall serve without compensation." Is this ordinance valid, or is it *ultra vires*? The relator insists that the power given the council in the ninth section of the charter act, and quoted, to change the compensation of the mayor does not confer, or imply, the authority to take away all compensation; while the defendants maintain the converse of this proposition.

In determining this question, we must keep in mind, among other things, the fact that this charter act applies only to cities of a population of "thirty-six thousand and upwards." Millions of property are affected by the administration of the city government. For this reason, the Legislature, it is to be inferred, would be more *cautious* in its grant of power. A liberal grant of power to a village might not prove disastrous, while the same grant of power to a city might ultimate in financial ruin. This act bears evidence that it was drawn with great care. It expressly provides, that councilmen shall receive no compensation. If it had intended that the mayor and the board of public works and affairs should receive no compensation, it certainly would have been so

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expressed. If the act had intended to leave this question of the compensation of the officers of the executive and administrative departments to the discretion entirely of the council, and leave the council to determine whether they should receive any compensation at all for their onerous services, it certainly would have contained a clear provision to that effect. The withholding of pay from the officers of the legislative department of itself, indicates an intention that the officers of the other two departments should receive compensation; and this intention is emphasized by the provisions in sections nine and twenty-eight relative to compensation. The office of mayor is created by the charter act, as is the office of councilman. The mayor and councilmen are chosen by popular vote. The board of public works and affairs are chosen by the council, but their salaries are to be fixed before they are chosen. Why does the act fix the mayor's salary at \$2,400 till changed by the council? The fact that it was so fixed for the first term, shows that the Legislature intended he should have compensation; and the act fixes an amount adequate to secure respectable capacity. It was not left to the council after elected, lest an amount unsatisfactory should be fixed. By providing a salary for the first term, and till changed by the council after the city was organized, we have an expression from the Legislature as to the meaning and intention of the act, to-wit: That the mayor should receive compensation. If the city council can deprive the mayor of compensation, there appears no reason why it may not also refuse compensation to

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the board of public works and affairs. The council is empowered to *change*, in like manner, the pay of said board. This board is required not to engage actively in any other business, but if the mayor does his duty under this act he will not have time to engage actively in any other business. If the council can deprive the mayor and the board of public works and affairs of all compensation, then it has the power to so emasculate those departments of the government that all vigor and efficiency will be gone, and the government of the city will be left, practically, in the hands of the council. In such event the system of government provided by the charter act will be subverted and the intention of the Legislature *thwarted*. It cannot be that so dangerous a power was intended to be lodged in the council.

It is urged, however, by defendants that as the power of the council to *change* the compensation is expressly given, that it can reach the same end as that sought in said ordinance by reducing the mayor's salary to a nominal amount, and that this being true demonstrates the correctness of the position that the council has the power to abolish the salary altogether—that it is useless to deny this *plenary* power, when the council can change the salary from \$2,400 to one dollar. In the case of the State at the relation of *Hulsey v. Gaines*, 2 Lea, 322, Judge McFarland says of an argument of this character: "This is an argument often resorted to, and no argument is more fallacious." We may enlarge the suggestion. When officials are advised of the fact that their power

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over a given matter is not absolute, but that they have a trust to discharge, a court will never presume that they will abuse that trust. If the city council should ever attempt to abuse their trust, it will be time enough then to decide whether their action, in the exercise of a clearly vested power, is final and not subject to revision by any tribunal—whether the only remedy left is an appeal to the electors at the ballot box. It might be that an ordinance reducing the mayor's salary to a nominal amount would be unreasonable and void; or that an ordinance increasing it to an exorbitant amount would likewise be invalid. The one hundredth part of the salary fixed by the charter act is twenty-four dollars. One hundred times the amount so fixed is \$240,000. Defendants argue that the council can reduce the compensation to as small a sum as twenty-four dollars. If so, can they not increase it, if they see fit, to \$240,000? But, as stated, it is not necessary to decide this point.

As already intimated, an inspection of said act will show that the duties of the mayor are numerous and important. The office is by no means a sinecure. One of his important duties is to see that all the laws and ordinances of the city are faithfully executed. Without pay, he cannot be expected to give much attention to the affairs of the city. The law will not permit an officer's salary to be taken for his debts, because without salary he would not be able to discharge his trusts. Human ingenuity cannot devise a system of laws so perfect but that unscrupulous and designing men can evade and pervert them,

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and no safeguard is equal to constant watchfulness and supervision. Any one at all familiar with the administration of public affairs knows the necessity of constant scrutiny, and the act under consideration imposes important supervisory duties upon the mayor. What is here suggested is not said with reference to the policy or impolicy of the ordinance referred to, but these considerations can be legitimately looked to in ascertaining the intention of the Legislature. That the council may have been influenced by the best of motives, of course does not affect the question at issue.

It is also insisted by the defendants that the relator knew, when he offered himself for the position of mayor, that the salary had been abolished, and is, therefore, estopped. The ordinance abolishing the salary being void, it cannot affect the legal rights of the relator: *Burch v. Baxter*, 12 Heis., 603.

There are other reasons that might be adduced why said ordinance is void, but we deem it unnecessary to give them. And, in the view we have taken, it is unnecessary to pass on the question whether said ordinance was unreasonable or oppressive. A grant of charter powers, as a general rule, is strictly construed. A power exercised under a municipal charter must be expressly conferred, or fairly implied from the language or purposes of the act. We have not found or been furnished with any precedent in point, but under the admitted principles of construction, we hold that the ordinance of May, 1885, depriving the mayor of compensation, was beyond the power of the city council and void.

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It is also insisted that the relator is not entitled to compensation, because while a candidate he promised he would serve without compensation if chosen to the office. This statement is set up in some of the answers, while the answer of four of the defendant councilmen says, in substance, that this allegation is untrue. This allegation in avoidance was demurred to by the relator, said demurrer was sustained by the circuit judge, and as the answer, besides this, set out no other or further ground of defense than had been already determined on the demurrer to the petition, on motion, the peremptory writ was awarded.

The circuit judge properly sustained the demurrer to the answer. Even if it be true that the relator, while a candidate, told the electors that he would serve without compensation if elected, this is not a contract, nor is he estopped thereby. If a candidate makes such a promise to the voters, it is only binding in the forum of conscience. It may impose upon him a moral, but no legal obligation. If an office have a salary attached to it, it is even against public policy to permit such agreements. This has been determined in numerous cases, some of which have been cited in argument: 36 Wisconsin, 213; 72 Missouri, 13; 53 Iowa, 346; 20 Pick., 428.

Such an agreement by a candidate might be ground on which to remove him from office after election, but is no legal reason to prevent his receiving the salary of the office.

The judgment of the circuit court will be affirmed and the cause remanded to the end that the peremptory writs be issued.

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I. S. GREEN and EASTMAN G. CURREY v. THE STATE.

1. CONSTITUTIONAL LAW. *Jurors.* Sections 7 and 13 of act of 1885, "to organize and incorporate an independent militia," providing that fifteen per cent. of the voting population of a county may organize into militia and be exempt from serving on jury, is unconstitutional in so far as same undertakes to exempt the members from serving on jury.
2. SAME. *Militia. Governor.* Section 11 of said act, which empowers the governor to call out the militia, when he deems it necessary, to suppress mobs, riots, etc., is unconstitutional.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. MATT. W. ALLEN, J.

JNO. V. WRIGHT and E. R. THURMAN for Green and Currey.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Green and Currey were summoned as jurors to try a case in the criminal court of Davidson county.

They failed and refused to obey the writ, and were fined ten dollars each.

They have appealed to this court, and insist they are exonerated from such service, as members of a military organization of the county of Davidson, by the provisions of an act entitled "an act to organize and incorporate an independent militia."

This act was passed in 1885. The first section

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provides "that for the purpose of creating greater efficiency in the military system, charters may be granted to any association of individuals for the purpose of organizing themselves into independent military companies, battalions, squadrons, regiments and batteries," etc.

By subsequent sections the form of a charter is suggested; the powers and duties of the corporation defined, and amongst other powers and liabilities, "it may sue and be sued by the corporate name; have a common seal; hold real and personal estate," etc. And the said corporation is also authorized to elect a president, secretary and treasurer; make by-laws, rules and regulations. The term of office is defined, the capital stock and mode of raising it prescribed, and other duties and powers specified. But the corporation is prohibited from using the assets in dealing in currency, notes or coin.

Section seven provides that in any county of the State "male citizens between the ages of sixteen and sixty-five may organize themselves into companies, and these companies may form squadrons, battalions and regiments, and may have active and honorary members who shall pay a fee for admission, provided, however, that the whole number of active and honorary members shall not embrace more than fifteen per cent. of the voting population of the counties where organized. The governor, by section eight and subsequent sections, is made commander-in-chief, with power to call out the force to suppress riots, insurrections, mobs or breaches of the peace, etc.

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Section thirteen of the act, exempts from service as jurors the members of the organization, by exhibiting certificates of membership.

Such are the material provisions of the "act to organize and incorporate an independent militia."

It is insisted for the State that the act is unconstitutional, because in conflict with article eleven, section eight, and article two, section seventeen of the Constitution.

The section first cited provides, amongst other things, that the Legislature shall not pass any law granting to any individual or individuals, rights, exemptions, privileges or immunities, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

The act in question does grant the right to fifteen per cent. of the citizens of a county to organize as a corporation, and thereupon exempts them from jury service, while the balance of such citizens are denied the right and exemption provided for the favored number. Nor can the excluded number, by anything they can do under that act, receive its immunities and privileges, but under the general laws of the land, eighty-five per cent. of the citizens are bound to perform jury service, from which, under the act in question, the fifteen per cent. are exempted.

Article two, section seven of the Constitution declares, "No bill shall become a law which embraces more than one subject, and that subject to be expressed in the title. We have seen the title to this

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bill relates solely to the organization and incorporation of the militia. It is not necessary that the title should express fully what is contained in the act. And the generality of the title is no objection if it is not made to cover legislation incongruous in itself: 8 Heis., 519; 2 Lea, 429; 8 Lea, 596; 12 Lea, 253.

The act in question, while it purports to relate only to the organization of the militia, provides personal exemption of the individual members from duties incumbent on other citizens by the general law.

This exemption or personal benefit has no relation or relevancy to the subject expressed in the title to the act.

It is also insisted that section eleven of the act of 1885, which empowers the governor to call out the militia when he deems it necessary, to suppress mobs, riots, etc., is in conflict with section five of article three of the Constitution, which provides that the militia shall not be called into service except in case of rebellion or invasion, and then only when the General Assembly shall declare, by law, that the public safety requires it.

We think that section eleven and thirteen of the act of 1885 are unconstitutional and void, and the judgment of the criminal court is affirmed.

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JOE D. FOUTE v. THE STATE.

1. **CRIMINAL LAW.** *Joining offenses in indictment.* Counts for obtaining money by false pretenses, and for passing forged paper, may be joined in an indictment. Different offenses punished by different degrees of severity, differing only in degree, and belonging to the same class of crimes, may be united in different counts under an indictment, especially when the offense is the same, and the several counts are inserted to meet the uncertainty of the evidence, and it is not error for the circuit court to refuse to quash for that reason, or to refuse to compel the prosecutor to elect upon which of the charges he would proceed.
2. **SAME.** *Venue.* The defendant being sheriff and jailer of Loudon county, enclosed false and fraudulent, altered and forged accounts, sworn and certified to as required by law, in a letter to the comptroller at Nashville, and received in return warrant on the treasurer, which the defendant sent to the treasurer at Nashville, and was paid by check on Bank of Knoxville, and the money was received there by the defendant. *Held*, the defendant was indictable at Nashville for passing forged paper.
3. **SAME.** *Defective counts.* When two counts in an indictment are founded on the same facts, and one count is defective and the defendant is convicted, the conviction will be referred to the good count and will stand, if it appears the defendant was not prejudiced in his defense by the defective count.
4. **SAME.** *Evidence.* Under an indictment for passing forged bills for jail fees, the passing of other forged bills than those set out in the indictment, may be shown to prove the *scienter*.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. MATT. W. ALLEN, J.

E. H. EAST, LYTTON TAYLOR and DAVID R. NELSON for Foute.

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ATTORNEY-GENERAL LEA and HEAD & CHAMPION
for the State.

DEADERICK, C. J., delivered the opinion of the court.

Defendant, Foute, was convicted in the criminal court of Davidson county, on an indictment containing two counts, one for obtaining money by false pretenses, and the second for passing forged paper.

The facts constituting the false pretense, as charged, in substance, are that defendant Foute was sheriff and jailer in Loudon county, and enclosed in a letter to P. P. Pickard, comptroller, accounts for jail fees claimed to be due him, in State cases for the months of May, June, July and August, 1884; that the accounts were false and fraudulent, and upon his representations, the accounts being properly certified on their face when received by the comptroller, he issued his warrant upon the treasurer, which was paid by the treasurer when presented; that the claims set up were false and fraudulent, and were concocted to defraud the State of Tennessee.

The second count charges that defendant unlawfully, feloniously and fraudulently did pass and transfer a certain forged report and jail bill, which is set out, and is the same as that for the month of May, which appears on its face to have been approved by the judge and attorney-general, and sworn to by defendant before the circuit court clerk, intending to defraud the State, well knowing the said report and jail bill to be forged, etc.

It satisfactorily appears from the evidence, that

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for each of the four months mentioned in the indictment, the defendant made out his account correctly and had it approved by the presiding judge, and attorney-general. These officers testified that the bills exhibited on the trial were approved by them, and then each had from six to eight or ten names of prisoners, and now have thirty to forty names, which were not on them when approved.

These names were all in the hand-writing of defendant. And the circuit court clerk, Cassedy, stated that he swore defendant to several papers, he only exposing that part of the paper containing his, defendant's oath, and the clerk's certificate, his name appearing on bills.

So that, when received by the comptroller, they appeared to be in conformity to the requirements of section 6309 of the new Code, and the warrant was issued and sent by mail to defendant at Loudon, sent by him to the treasurer at Nashville, and paid by check on Bank of Knoxville, and the money received there by defendant, so that there can be no doubt defendant received a large amount of money from the treasury to which he was not entitled, by means of the fraudulent alteration of said bills after they were officially approved.

In the court below the defendant moved to quash the indictment because it contained a charge of two distinct felonies of different degrees. This motion was overruled, and defendant then requested the court to require the attorney-general to elect upon which of the two counts he would put defendant on trial. This

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the court also refused to do, and this, it is insisted, is error.

Both of these questions are settled in a recent decision of this court, in which it is said: "It has long been settled in this State, in accord with authority, that different offenses, punished by different degrees of severity, differing only in degree, and belonging to the same class of crimes, may be united, and it is not error for the court below to refuse to quash for this reason, or to refuse to compel the prosecutor to elect on which of the charges he would proceed: 4 Lea, 176, citing 8 Hum., 69; 10 Hum., 11; and this is especially so where the offense is the same, and the several counts are inserted to meet the uncertainty of the evidence: 7 Cold., 77; 4 Hum., 194; 3 Lea, 559.

There was, therefore, no error in the refusal of the court to compel election, or to quash the indictment.

It is next insisted that the offense, if committed at all, was committed in Loudon, not in Davidson county. The false pretense was contained in the letter and the accompanying bills transmitted to, and received in Nashville, and so as to the passing of the forged paper. Both counts are founded upon, substantially, the same facts.

And this being so, and it appearing that the judge had distinctly stated in his charge that upon the first count they could not punish beyond ten years, and on the second they might fix the punishment from three to fifteen years—the verdict being for thirteen

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years—it is thus seen, although the verdict was general, it is sustained by, and was in fact rendered upon, the second count.

It is insisted that the first count is defective, not in form, but in charging that certain facts alleged, made the defendant guilty of “false pretenses” under our statute.

It is insisted that the facts charged in the first count do not constitute a false pretense, in its legal sense. Passing counterfeit money for property, was held not to be a false pretense, but an offense of higher grade than that of obtaining money by false pretenses, and not punishable as a false pretense, because it had been long previously declared a distinct, substantive felony, and differently punished: 1 Cold., 172; 2 Head, 231.

The same reasoning would apply to forgery, as it is an older felony than that made by the act of 1842, punishable with greater severity. “To hold otherwise,” says the court, in the case in 1 Cold., “would involve the law in confusion,” punishing different persons for precisely the same criminal acts differently, as the prosecution might be conducted under the one statute or the other.

But if the facts averred did constitute the offense charged, there would be, of course, no ground of objection, the count being good in form. If they did not constitute such offense, the count would be defective or bad in law. And as it was founded on the same facts charged in the second count, and admitted of the same evidence, and, as we can see, defendant

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was not prejudiced in his defense thereby, the verdict being founded on the second count, the conviction would be referred to the second count and stand if good: 1 Sneed, 114; 3 Heis., 222; *Ib.*, 464.

The second count of the indictment charges, in apt words, that defendant did, unlawfully, fraudulently and feloniously, pass and transfer a certain forged report and jail bill, setting out the report and jail bill in full, approved by the judge and attorney-general, and sworn to by defendant before the clerk of the court, with intent to defraud, well knowing the said report and jail bill to be forged, etc.

Forgery is defined by our statute to be "the fraudulent making or alteration of any writing to the prejudice of another's rights:" New Code, sec. 5492.

The next section is as follows: "Whoever fraudulently passes or transfers, or offers to pass or transfer, any forged paper, knowing it to be forged, with intent to defraud another, is guilty of a felony."

The evidence shows that the jail bills mentioned, were transmitted by defendant with a letter for him, to the comptroller at Nashville, for payment. They were returned to defendant to amend some defect as to clerk's certificate, and were returned to Nashville to the comptroller with the amendment made.

It is insisted by defendant's counsel that the jail bills, having been improperly certified, were not the subject of forgery; that the comptroller was not bound to receive or issue his warrant for the amount.

The argument is, that before the proper certificate of the clerk was made, that the forgery, if any, was

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perpetrated, and at a time when the paper could be of no legal effect, for the want of the clerk's certificate. The court charged the jury, if the attorney-general and judge, or either of them, signed the paper, and defendant then inserted new names fraudulently, and afterward procured the signature of the clerk, who did not know what he was signing, and perfected the paper and passed it, it would be forgery.

We think this is correct. Defendant presented his jail bill, with the proper number and names on it, and the attorney-general and judge approved the bill, as containing proper allowances, and then the defendant added thirty or forty other names of persons and amounts due for them, when he knew no such fees were due. After this was done, he, by concealing all the names, procured the clerk to swear him to the correctness of the bill, and attest the oath, and then he sent it to the comptroller regular in form, as required by section 6309 of new Code, obtained a warrant and the money, as before stated. It was clearly a fraudulent alteration of a writing to the prejudice of another's right.

The judge and attorney-general had certified that defendant was entitled to fees for keeping six or eight prisoners. By his alterations he made them certify that he was entitled to fees for keeping forty or fifty. This fraudulent scheme was perfected by defendant's oath before the clerk, that the account was correct, and when he transmitted it to the comptroller, he knew it had been altered by himself, for the purpose of defrauding the State. But it is also insisted that the

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offense, if committed at all, was committed in Loudon, and not in Davidson county. The offense charged is, "passing and transferring" the paper. The statute recognizes a difference between altering or offering to pass, and actually passing. In order to complete the "passing" it must be received: 3 Gr. Ev., sec. 110. There must be a receiving of it by the person to whom it is passed: 1 Bish. Crim. Law, sec. 323. If sent by mail, and it never reaches its destination, the sender might be guilty of "offering to pass," but not of "passing." It is not "passed" until received, and the court of the county in which it is received has jurisdiction of the offense: 21 Wend., 533; 2 Barb., 388; 8 Denio, 190; 2 Dallas, 388.

Objections were taken by defendant to the admission of evidence of other forged bills for jail fees passed by defendant than those set out in the indictment. It was held by this court, in a prosecution for forging of county warrants, that the issuance of other forged warrants was admissible to prove the *scienter*: 5 Lea, 219. See also, 3 Greenl. Ev., sec. 111a; 9 Hum., 31; 3 Heis., 62; 13 Lea, 701. Upon making up the jury the judge stated that he had adopted a rule prohibiting the attorney-general and counsel for defendants from asking the juror if he had formed or expressed an opinion, etc., and requiring that the counsel should submit such questions to the court, and he would ask the juror. And such questions should not be directly by counsel of the juror, but through the court.

This court would not, except in a clear case requiring its intervention, interfere with the exercise of

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the discretion of the inferior judges as to the manner of conducting the business of their courts. They may make rules for the more speedy or satisfactory disposition of business before them, and no doubt would not adopt a rule that would prejudice parties, nor adhere to one which, from experience, might be found to delay rather than expedite the dispatch of the business of the court. We do not see that any prejudice resulted, or could have resulted to defendant, from the enforcement of the rule in question.

We are satisfied that the verdict of the jury is well sustained by the evidence, and that there is no error in the charge or rulings of the court, and the judgment must be affirmed.

JAMES HARRISON v. THE STATE.

CRIMINAL LAW. *Selling liquor. Evidence.* Upon the trial of defendant on an indictment for selling liquor within four miles of an incorporated institution of learning, where it appeared the trustees, by writing, had leased the school to the teachers, and by said lease no right of supervision or control was reserved. *Held*, it was competent for the State to prove by parol that the trustees still retained the supervision and control over said school. While it might be incompetent as between the lessors and lessees to admit the parol proof, yet the defendant can not rely upon the objection.

FROM DEKALB.

Appeal in error from the Circuit Court of DeKalb county. MATT. W. ALLEN, J., sitting by interchange.

Harrison v. The State.

JAMES M. QUARLES and W. W. & W. T. WADE
for Harrison.

ATTORNEY-GENERAL LEA for the State.

COOKE, J., delivered the opinion of the court.

The defendant was indicted under section 5679 of the Code (M. & V.), for selling intoxicating beverages within four miles of an incorporated institution of learning. He has been tried and convicted, and sentenced to pay a fine of \$100, and to be imprisoned for sixty days, and has appealed to this court. The evidence of the sale of the spirituous liquors is sufficient to sustain the charge, and there is no error in the instruction of the court upon that subject, and the only question necessary to be considered is, as to whether Pure Fountain College, within four miles of which the sale was made, was an incorporated institution of learning within the meaning of the section of the Code above cited.

The charter of Pure Fountain College was registered July 25, 1881, as shown by the certified list published by the secretary of State, and bound with the acts of the Legislature of 1883, as required by section 1697 of the Code, and which, by the provisions of the same section, is made legal evidence of the existence of such corporation. Said corporation was organized and erected a school building, and on March 29, 1884, by a contract in writing, "rented and leased" the same, together with the grounds, fixtures, etc., thereunto appertaining, to P. W. Dod-

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son and T. B. Kelly for the term of five years, commencing July 1, 1884, and to expire July 1, 1889, to be used by them for school purposes and no other; said Dodson and Kelly binding themselves to teach in said building, a graded normal school forty weeks in each year; and said Dodson and Kelly further agreed to employ and pay a corps of 'competent assistant teachers, sufficient in numbers to give due instruction to all the students who may attend said school; and they further agreed and bound themselves to pay to said trustees, their agent or successors, a sum equal to six per cent. of the gross amount received by them for tuition, payable semi-annually.

Said lessees, Dodson and Kelly, took possession of said building and premises under said lease, employed a corps of teachers and had a school in successful operation at the time of the sale of the liquor within less than four miles of this school by the defendant, and for which he is indicted. As will be seen by the terms of this lease, said corporate authorities reserved no right or power of supervision or control whatever over the school, provided for in said lease. On the trial, however, it was proved, over the objection of the defendant, that said lessees advise with the trustees about the employment of teachers; that they nominate them before the board, and the board confirms them; that they have no contract outside of the lease, and are holding the college and teaching under the lease; but that the trustees still retain a general supervision and control of the school in regard to discipline and management; that the

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teachers consult and confer with the trustees in all such matters. The action of the court in admitting this testimony over the defendant's objection, is assigned and insisted upon as error, for the reason, as alleged, that it is admitting parol testimony to vary the written contract. We do not think so. This is not a contest between the parties to the contract as to their respective rights under it, and whether the right of supervision in the trustees exists by the contract or by the voluntary concession or procurement of the lessees, can make no difference to the defendant. It was a right which the corporate authorities were exercising at the time, and which the lessees recognized and acquiesced in. The minutes kept by the board of trustees are in the record, and show that before teachers were employed they were nominated to the board by the lessees and elected by the board, or their nominations confirmed. The trustees were in the exercise, as we think, of their proper functions when they procured said lessees to conduct the school, and who, we presume, were selected by them as suitable and proper persons for that purpose, and the quality, conduct, etc., of the school to be taught was provided for in the lease. We think this school, organized as it was, and conducted under the supervision of the corporate authorities as above stated, was an incorporated institution of learning within the meaning of the section of the Code above referred to, known as the four mile law. How it might have been, had the lessees stood upon their strict rights under the lease, and denied the right

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of the board to supervise or control their operations in any respect, it is not necessary to determine, but the right being conceded and acted upon by both parties, it is the same, so far as the defendant and the public are concerned, as if no such lease had existed. This school was subject to the mischief intended to be remedied by the passage of the act, and is entitled to its protection, and so the court virtually instructed the jury. In this there was no error.

This is not like the case of *Dunlap & Windham v. The State*, decided at this place at the December term, 1883, of this court. In that case, the building was incomplete, the corporate authorities were not prepared to organize a school under their charter, and permitted a free school to be taught in the unfinished building under the supervision alone of the free school commissioners, and with which they had nothing to do. In that case, we held the free school was not an incorporated institution of learning. We are still satisfied with that decision, but the case here presented is wholly different. There is no error in the record, and the conviction was proper. We see no circumstances of aggravation in the sale of the liquor in this case, as the testimony shows it was sold to an old and feeble man to make into bitters to be taken by him and his wife, who was also in feeble health, as medicine. We therefore feel inclined to reduce the term of imprisonment imposed by the circuit judge to one month, which is the lowest term that can be imposed under the statute. With this modification, the judgment must be affirmed.

Taylor and Wife v. Rountree.

G. T. TAYLOR and WIFE v. P. P. ROUNTREE *et al.*15L 725
4pt 279

1. CHANCERY PLEADINGS AND PRACTICE. *Non-resident. Personal decree.*
Upon a bill to foreclose a mortgage, a personal decree for any balance not satisfied by sale of the mortgaged property, may be rendered against a non-resident defendant brought before the court by publication under the provisions of our statutes.
2. HUSBAND AND WIFE. *Liability of husband for debts of wife.* Prior to the act of 1877, the liability of the husband for the debts of the wife attached and was fixed at once upon marriage, and where the marriage was consummated before said act, its passage did not relieve the husband of the debts of the wife due at date of marriage.
3. STATUTES. *Rule of construction.* Statutes are to be taken as prospective in their operations, unless a contrary intention is clearly expressed upon their face.

FROM SUMNER.

Appeal from the Chancery Court at Gallatin. GEO.
E. SEAY, Ch.

BLACKMORE, WILSON and HEAD for complainants.

JNO. J. VERTREES for defendants.

COOKE, J., delivered the opinion of the court.

On January 11, 1875, W. J. Sweeny, E. A. Sweeny, Ermine Sweeny, W. B. Mitchell and F. V. Mitchell executed their promissory note to respondent, Rountree, for \$6,415.20. This, while the joint note of all the makers upon its face, was given for money borrowed by W. J. Sweeny, the others being, in fact, his sureties. And to secure this note said W. J., E. A. and Ermine

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Sweeny executed a mortgage upon their respective interests in a tract of land lying in Sumner county, Tennessee, they all being citizens of that county at the time, and the note having been there executed. Rountree was a citizen of Kentucky, subsequent to the execution of this note and mortgage, and in 1876 Ermine Sweeny intermarried in Sumner county with complainant, G. T. Taylor, who was a citizen of Kentucky, and removed with him to that State, where they have continued to reside ever since. On February 9, 1877, Rountree filed his bill in the chancery court of Sumner county against all the makers of said note, and G. T. Taylor, the husband of Ermine, seeking a recovery against them upon said note, and to foreclose said mortgage by a sale of said lands and the application of the proceeds to the satisfaction of his said demand. Taylor and wife were made parties respondent, and were brought before the court by publication, process being duly served upon the resident respondents. An attachment was also prayed for and issued upon a *fiat* of the chancellor, and levied upon the land, but the affidavit was insufficient to sustain the same as an attachment bill, and the attachment cuts no figure and need not be further noticed. On June 10, 1879, judgments *pro confesso* having been previously taken against said Taylor and wife, a decree was rendered against all of said respondents for the amount of said note and interest, said mortgage foreclosed and said lands ordered to be sold for the satisfaction of said decree. Said lands were sold and the proceeds so applied, but which were insufficient for

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that purpose, leaving the larger portion of said decree unsatisfied. This decree was unappealed from, but on December 6, 1879, the bill in this case was filed by complainant, Taylor, and wife, as a bill of revivor against Rountree and others, seeking to have said decree, so far as it was a personal decree against them upon said note, set aside and vacated for alleged errors apparent upon the record in that case.

Many errors were assigned as apparent upon the face of said decree and proceedings, but two of which, however, are now seriously insisted upon, and which, in our judgment, are all that need be noticed. In the first place it is insisted that as the respondents, Taylor and wife, were non-residents, and brought in under that bill by publication alone, there being no personal service upon them, the court did not acquire personal jurisdiction as to them, and that the decree as against them upon said note, except to the extent of subjecting the lands conveyed in the mortgage, was erroneous upon its face, the court having no jurisdiction to render a personal judgment against them. And this was so held by the Supreme Court of the United States in the case of *Pennoyes v. Neff*, 95 U. S., 714. However, under our statute, old Code, sec. 4352, subsec. 1, and 4357, the law has been held different in this State, and such a judgment has been directly held to be valid and proper: *Kyle v. Philips*, 6 Baxt., 43. The only difference between that case and the one now under consideration is, that was a proceeding by publication against a non-resident to enforce a vendor's lien, and a personal judgment was rendered for

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the excess, after applying the proceeds of the land, and this was to foreclose a mortgage executed to secure the debt. There is no difference in principle, and the case cited is directly in point. The same principle was recognized in *Mulloy v. White & Harris*, 3 Tenn. Chan., 9. So that it may be taken as settled in this State, that under our statutory provisions, contained in the sections of the Code above cited, the court in such a case does acquire personal jurisdiction of the parties, and may render a personal judgment for the debt.

On March 19, 1877, which was after the bill was filed, but before the decree sought to be reversed was rendered, the Legislature passed an act, entitled an act to amend the law in regard to the property of married women, by which it was enacted, "that hereafter no husband shall be liable for the debts, contracts or obligations of his wife, incurred by her previous to her marriage; provided, however, that the marital rights of the husband shall not attach to the property of the wife, owned by her at the time of marriage, or which she may become owner of subsequent to her marriage, as heir or distributee, so as to prevent the creditors of the wife from subjecting her property to the satisfaction of their debts": Acts of 1877, p. 104. It is insisted, in the next place, that under and by virtue of this act, although passed subsequent to the execution by the wife of the note sued upon, while a *feme sole*, as well as subsequent to the marriage, and the institution of the suit upon it, against the husband and wife, the liability of the husband for

this anti-nuptial debt was taken away, or prevented from attaching. And the argument in support of this position is that his liability, as the law existed prior to its passage, did not become fixed until judgment against him upon it; and that prior to the recovery of such judgment, the situation or condition of the husband in relation to such anti-nuptial debt of the wife was a sort of legal status, or contingent liability, which the Legislature might change at pleasure, without the impairment of the obligation of any contract, or destruction of any vested rights. In support of this position we have been referred to a decision of the Supreme Court of Kentucky, upon a statute of that State very similar in its provisions to those of the act of 1877, now under consideration, in which it was held that under the provisions of that statute, no recovery could be had against the husband for the debts of the wife contracted *dum sola*, although the marriage had taken place before the passage of that statute: *Fultz and wife v. Fox*, 9 B. Monroe, 499. The only difference in principle, so far as we can discover, between that case and the one we are considering, is, in this case, suit had been instituted against the husband and wife upon the note before the passage of our statute, and in the case referred to, the Kentucky statute was passed before the institution of the suit. And this we do not consider very material. We are not satisfied, however, with the reasoning of the opinion in that case, and the only authority cited by the learned judge who delivered it, (Reeves' Dom. Rel., p. 69), does not, we think, sustain the conclusion, and

we have been referred to no other case sustaining that decision, and are not aware of any. The current of authorities is against it. By the common law upon this subject, which was in force in this State until the passage of said statute, one of the immediate consequences of marriage was, that the husband became liable for the anti-nuptial debts of the wife. He became, by the marriage, the absolute owner of her personal property, and became liable absolutely for her debts, which liability continued during coverture, and could only be discharged by the payment of the debts, or the death of the wife, or by his own death, before judgment taken against him: 1 Bl. Com., 443; 2 Kent's Com., 145; Reeves' Dom. Rel., 143; Schoul. Dom. Rel., 56, and numerous authorities cited. Blackstone says: "If the wife is indebted before marriage, the husband is bound afterwards to pay the debt, for he has adopted her and her circumstances together": 1 Com., 443. Kent says: "It is a strict rule of law, which throws upon the husband all the obligations of the wife; and by the same rule of law, he is discharged after the coverture ceases by the death of the wife": 2 Kent's Com., 144. Mr. Schouler says: "One of the immediate effects of marriage at the common law, is that the husband at once becomes bound to pay all outstanding debts of his wife. When married, she is married with her debts, as well as her fortune": Dom. Rel., 55-6. "By marriage the husband becomes liable to pay the debts of the wife, provided these debts be collected during coverture": Reeves' Dom. Rel., 143. But to this (the support of the wife), says

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Mr. Bishop, is the duty to discharge the wife's anti-nuptial undertakings of every pecuniary sort, provided he is required to do so during her life: 1 Bish. Law of Married Women, 61.

These authorities are amply sufficient to show that the husband's liability for the debts of the wife attaches, and is fixed at once upon the marriage, and a right of action immediately accrues in favor of her creditors against him, in which she must be joined, for the recovery of the same. This right is absolute and perfect during the continuance of the coverture; is vested and cannot be taken away by statute, even if the Legislature had so intended. "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the Legislature to take it away: Cooley Const. Lim., 449, citing a great many authorities, and among others, 4 Met. (Ky.), 385. But if this were not the case, it was not the intention, as we think, of the Legislature that the statute in question should have any retroactive force, or any other than prospective effect. This is indicated by the use of the word "hereafter" at the beginning of the section containing the provision above cited. Besides, the universal rule of construction is that statutes shall be taken to be prospective in their operation, unless a contrary intention is clearly expressed upon their face. And Mr. Bishop, after citing the case of *Fultz and wife v. Fox*, above referred to, concludes as follows: "The doc-

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trine, in a single word is, that in cases of doubt, the statute is to be construed as acting only prospectively," etc. 2 Bish. Law of Married Women, 53.

We conclude, therefore, that respondent, Rountree's right of action, or his suit then pending against Taylor and wife, was not affected by the passage of the statute in question, and there was no error apparent upon the face of the decree, or proceedings sought to be reviewed, which entitled the complainants to any relief.

The chancellor dismissed the bill, and the Referees have reported that his decree should be affirmed, and we are satisfied of the correctness of their conclusions.

The exceptions to the report will be overruled, the report confirmed, and the chancellor's decree affirmed with costs.

Woods and Todd v. Batey.

JOHN WOODS and AARON TODD v. BEN BATEY.

SUPREME COURT PRACTICE. *Superseding fiat of judge.* The Supreme Court is not authorized by the Code, section 3933, to supersede the fiat of a judge awarding a writ of *supersedeas* as incident to a writ of *certiorari* to bring up the proceedings of an inferior to a superior tribunal for revision.

FROM RUTHERFORD.

Application for *supersedeas*.

AVANT, SMITH & AVANT for petitioners.

PALMER & PALMER and RIDLEY & RICHARDSON
against petition.

COOPER, J., delivered the opinion of the court.

On January 4, 1886, the county court of Rutherford county, at its quarterly meeting, declared the office of sheriff of the county vacant, by reason of the removal of the sheriff from the county, and his failure to discharge the duties of the office. On the next day, the court elected the petitioner, Todd, sheriff of Rutherford county, to fill out the unexpired term of Ben Batey, who seems to have qualified accordingly. On January 19, 1886, Batey prepared a petition to the judge of the circuit court of Rutherford county for a writ of *certiorari* to bring up the proceedings of the county court mentioned to the circuit court for revision, and for a *supersedeas* "to stay all

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further proceedings of said county court herein complained of, and to stay all proceedings in, or claim to, said office of sheriff by said Todd." Upon this petition, Batey obtained from the Hon. E. D. Hancock, chancellor, a *fiat* to the clerk of the circuit court, directing him to "issue writs of *certiorari* and *supersedeas* as prayed for in the foregoing petition," upon the petitioner giving bond with good security in the penalty of \$1,600. The present petition, filed by Todd and the chairman of the county court, states that the clerk of the circuit court, under the *fiat*, issued a *supersedeas* restraining your petitioner, Todd, from exercising the duties and franchises of the office of sheriff to which he had been elected by the county court, also restraining him from proceeding in said office, also restoring said Batey to the office of sheriff of Rutherford county. The petitioners, however, do not accompany the petition with a certified copy of the *supersedeas*, which is the best evidence of its contents, nor, in fact, with any copy of the proceedings of the circuit court.

The petition to this court is for a writ of *supersedeas* to supersede the *fiat* of the judge, under the Code, section 2933. That section is: "The Supreme Court in term, or either of the judges in vacation, may grant writs of *supersedeas* to an interlocutory order or decree, or execution issued thereon, as in case of final decrees." This court did, in one or two cases, undertake to revise the action of chancellors at chambers, in granting or dissolving injunctions, no point being made by counsel as to the jurisdiction

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of the court: *Keese v. Civil District Board*, 6 Cold., 127; *Williams v. Boughner*, 6 Cold., 486. But afterward, in a well-considered opinion, by Andrews, J., the court, composed of the same judges, held that the jurisdiction of this court was confined to the staying of proceedings under decrees or orders which are of a nature to be actively enforced: *Railroad Company v. Huggins*, 7 Cold., 217. Since that decision was made, this court has adhered to it, and has limited its action to the superseding the execution of interlocutory orders and decrees of the court of an affirmative character, which interfere with the rights of the parties in advance of the hearing.

The present application is not to supersede an interlocutory order or decree, or execution issued thereon. It is to supersede the order of a judge at chambers granting the ordinary writ of *certiorari* to bring up the proceedings of the county court in a particular matter to the circuit court, and to supersede the execution of the judgment of that court. All of our judges of first instance are authorized to grant these writs in proper cases, and upon proper application. The discretion to grant the writs is intrusted to them. If a *supersedeas* be awarded, the Code, section 3132, prescribes the clerk's duty: "The clerk shall also issue a writ of *supersedeas* in all necessary cases, directed to the opposite party, or the officer in whose hands the execution may be, which shall effectually supersede all further proceedings thereon." The *fiat* sought to be superseded in this case is to "issue writs of *certiorari* and *supersedeas* as prayed for," which

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is the usual form and correct. It does not mean a *supersedeas* containing all the prayers the petitioner may have made in his petition, but the *supersedeas* given by the law, which effectually supersedes all further proceedings on the "sentence, judgment or decree" of the county court. If the clerk has gone beyond the *fiat* and the law, the unauthorized provisions are probably void, and at any rate may be stricken out by the judge or court having jurisdiction of the case, upon proper application. Be this as it may, we are clearly of opinion that this court has no jurisdiction to supersede the *fiat* of a judge merely granting writs of *certiorari* and *supersedeas* to remove a case from an inferior to a superior tribunal, even if the *supersedeas* issued goes beyond the requirements of the law.

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2. *Judges of facts and law.* A submission which does not reserve to the court the power of revision makes the arbitrators the judges of the law as well as the facts, and they need not state the grounds of their decision; but if the arbitrators state the facts in their award and their deduction of law, showing that they intended to be governed by the law, it is for the court to say whether they have drawn proper conclusions. *Id.*
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1. *Not a judgment.* A delivery bond, although it operates as a judgment by statute so far as to authorize the issuance of an execution thereon, is not a judgment. *Memphis Water Company v. Magens & Co.*, 37.
2. *Estoppel.* A delivery bond which does not recite that the chattels levied upon were the property of the judgment debtor, or were levied upon as his property, will not estop one or more of the obligors from claiming the ownership of the chattels, especially if resorted to merely as a means of taking the property out of the hands of the sheriff with a view to settle the rights of the parties by an agreed case. *Id.*

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1. *Mesne profits. Rents.* A bill filed to recover the possession of land, and remove a cloud from the title of the complainant by reason of the claim of the opposing party, and, as incident to the relief sought, an account for mesne profits, mining coal and cutting timber, is a bill of pure equitable cognizance under our decisions, and all that the complainant can claim on the account is reasonable rent and just compensation for the coal mined and wood cut. *Ross v. Scott and Russell*, 479.
2. *General creditors' bill.* Several creditors of an insolvent firm of non-resident partners, doing business in Tennessee, may unite in filing a general creditors' bill on behalf of themselves and all other creditors, who will make themselves parties thereto, and, if the debtors do not object, may, under attachment, impound all their property for the joint benefit of all creditors coming in under the bill; and creditors impeaching the proceeding cannot participate in its benefits. *Bank v. Haselton*, 216.
3. *Same.* It is not a fatal objection to such a proceeding, that, no order was made that it should stand as a general creditors' bill and publication be made accordingly, for all creditors to come in under it. *Id.*
4. *Attachment. Impeachment by other creditors.* *Semble* that a subsequent attaching creditor may impeach an attachment for defects on its face; and also, where the debtor and attaching creditor reside in the same foreign State, though this fact is not apparent in the proceeding. *Id.*
5. *Suit by the ultimate receiver of the money.* The person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself. *Ray v. Proffet*, 517.
6. *Guardian settlement.* If, upon a bill filed by a ward, after coming of age, against his guardian and the sureties of the guardian bond for an account, alleging various breaches of the bond, the court make a general reference covering all breaches, the omission of the clerk to report upon any particular breach contended for in the pleadings and proof, would be a proper ground of exception to the

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

report; and if the complainant failed to raise the point by exception, or in any other way, and in the meantime claim and obtain the benefit of a suit brought by the guardian to cover the matter of the breach, he will be held to have waived so much of the relief sought. *Hammond v. Beasley*, 618.

7. *Same. Guardian relieved. When.* A guardian will be relieved from the charge of the notes of his predecessor which turn out not to have been intended as notes, but informal receipts of the assets of the ward. *Id.*
8. *Same. Credits.* Credits may be allowed a guardian for a series of years not in excess of the income of the ward for those years, although the credits of a particular year may exceed the income of that year; and the credits given in the regular settlements of the county court are *prima facie* good without producing the *vouchers*, if not surcharged or falsified by pleadings or proof. *Id.*
9. *Collateral attack on judgment.* A judgment is only collaterally, not directly, impeached by a bill which does not make the judgment-creditor a party, and only proceeds against one of several judgment-defendants. *Byram v. McDowell*, 581.
10. *Void judgment.* A void judgment cannot be validated as to third persons who have previously acquired antagonistic rights, nor perhaps as to the party himself, although the latter may personally estop himself from contesting rights acquired under it, such estoppel not affecting third persons claiming under him by antecedent act. *Id.*
11. *Non-resident. Personal decree.* Upon a bill to foreclose a mortgage, a personal decree for any balance not satisfied by sale of the mortgaged property, may be rendered against a non-resident defendant brought before the court by publication under the provisions of our statutes. *Taylor and wife v. Rountree*, 725.
12. *Co-defendant. New parties.* A defendant to a bill in chancery cannot object to the action of the court in setting aside a *pro confesso* order against a co-defendant, and, with the assent of the complainant, making new parties defendant. *Bank of Bristol v. Bradley*, 279.
13. If one tenant in common of land is no party to a suit in which the interest of other co-tenants is sold, it is of no consequence to such tenant whether the proceedings are valid, or invalid, and he cannot be heard to impeach them. *Morelock v. Bernard*, 169.
14. *Erroneous decree.* Upon a bill filed by the makers of a trust assignment of land to enjoin a sale under the trust until the correct amount of the secured debt is determined, a final decree without a

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

cross-bill ordering the land to be sold to pay the debt ascertained, is probably of course, and, if not objected to by the complainants at the time, is clearly not void, but at most merely erroneous. *Id.*

15. *Consent decree. Character and effect of.* A consent decree is in the nature of a judicial contract between the parties consenting, and after its entry, is as conclusive upon parties as other contracts, and cannot be avoided by the subsequent protest or retraction of dissatisfied parties. *Boyce v. Stanton*, 346.
16. *Binding on whom.* Such decree is binding only on such parties to the cause as consent thereto, either in the terms of agreement or those of consequent adjudication, made in pursuance of the agreement, unless it clearly appear that the decree was rendered upon a hearing of the cause. *Id.*
17. *Sale of land to pay debts of decedent. Surplus.* Where land is sold to pay debts of decedent upon exhaustion of personalty, and a surplus is realized, it may be impounded and applied to the payment of a judgment against deceased in favor of a creditor who was not a party to the proceedings for the sale of the land. *Rhinchart, Ballard & Co. v. Murray*, 469.
18. *Judgment obtained by fraud.* Where appellant failed to prosecute his appeal by having record filed, and the appellee files record and has an affirmance of judgment without notice to appellant or his attorney, the appellant may, by bill, attack the judgment for fraud upon the allegation that appellee, "by his fraud, prevented the proper officer from sending the record to the Supreme Court in due and proper time; that he, though taking advantage of his own wrong and fraud, and falsely representing to the Supreme Court, when complainant's attorney was not present, and without notice, that complainant had failed and refused to bring up the record, and had abandoned his appeal, had procured fraudulently the judgment to be affirmed." *Pyett v. Hatfield*, 473.
19. *Administrator.* A bill filed by a creditor of an estate to compel the collection of a debt due to the estate secured by a vendor's lien on land sold by the deceased, is not a bill to sell realty descended, but to collect a personal asset endangered by the negligence or collusive conduct of the administrator. *Kelley v. Kelley*, 194.
20. *Administrator. Heir.* The heir, upon whom has descended the naked legal title to the land sold by his ancestor, holds the title in trust for the vendee and the administrator, and may properly be divested of that title as soon as the purchase-money debt is ascertained to the satisfaction of the administrator, or so as to be con-

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

clusively binding on him, and the land sold in satisfaction thereof. *Id.*

21. *Infant. Guardian ad litem.* It is irregular to take any step in a cause wherein there is an infant defendant until a guardian *ad litem* has been appointed, but the irregularity will be cured, so as not even to be error on appeal, if no binding decree is rendered until the infant is properly represented, and the guardian, having the opportunity to object, acquiesces in what has been done, and the court makes a correct decree on the case then presented. *Id.*
22. *Lost deed.* Under a bill filed to set up a lost deed, if the evidence clearly establish the proximate date of the deed, the names of the grantor and grantee, the signing of the deed by the grantor and its delivery to the grantee, and that the conveyance was of forty acres of a designated end of a seventy-five acre grant, the complainant would be entitled to have the deed set up, and title divested and vested accordingly, even if the precise metes and bounds set out in the original deed could not be ascertained. *Anderson v. Akard*, 182.
23. *Same. Boundaries.* And if the proof shows in addition that the boundaries of the land were pointed out by the grantor by the calls of the grant, beginning at a particular tree on one side of the tract, and running around to a particular tree on the other side, closing the boundaries by a straight line from one of these trees to the other, and that these boundaries were included in the deed, the boundaries of the grant by actual survey between the designated trees, and a straight line from one to the other, may properly be embodied in the deed, although the witnesses present at the making of the deed cannot recollect the poles and bearings actually called for in the lost deed. *Id.*
24. *Same.* Any person having a legal or equitable interest in land, however small, whose possession is endangered by suit, and even without suit, may come into equity to set up a deed lost before registration, by bringing before the court all persons having an interest in the land, and the title of the complainant in such a bill may be confirmed by deed of confirmation made after the filing of the bill, or by acquiescence in his claim. *Id.*
25. *Same. Limitation.* Neither the statutes of limitations, nor lapse of time have any application to a bill filed to set up a lost deed by a person in possession of the land conveyed therein. *Id.*

CHARGE OF COURT.

See PLEADINGS AND PRACTICE.

On abstract propositions. A charge on a particular point, neither required by the pleadings or the facts, is ordinarily a mere abstract

CHARGE OF COURT—*Continued.*

proposition for which the court will not reverse, especially if it is the converse of a proposition called for by a position of the party who assigns it as error. *Iron Company v. Dobson*, 409.

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CONSTITUTIONAL LAW.

See TAXES; JUDGES, SPECIAL; WAREHOUSE RECEIPTS.

1. *Jurors.* Sections 7 and 13 of act of 1885, "to organize and incorporate an independent militia," providing that fifteen per cent. of the voting population of a county may organize into militia and be exempt from serving on jury, is unconstitutional in so far as same undertakes to exempt the members from serving on jury. *Green and Currey v. The State*, 708.

CONSTITUTIONAL LAW—*Continued.*

2. *Militia. Governor.* Section 11 of said act, which empowers the governor to call out the militia, when he deems it necessary, to suppress mobs, riots, etc., is unconstitutional. *Id.*
3. *Corporations.* The provision of the Constitution, Art. xi., sec. 8, that "no corporation shall be created, or its powers increased or diminished, by special law," again held to apply only to private, and not to municipal corporations. *Ballentine v. Mayor and Aldermen of Pulaski.* 633.
4. *Repeals.* The general law of 1872, ch. 12 (new Code, secs. 1652, 1657), which authorizes any municipal corporation to establish a system of public schools upon consent of two-thirds of the qualified voters, is not repealed by the special act of 1885, ch. 37, amending the charter of the town of Pulaski by providing for the establishment of a system of free schools by the corporate authorities, without a popular vote. *Id.*
5. *Repeal by implication.* A repeal of a general law by implication is not within the purview of the Constitution, Art. 2, sec. 17. *Id.*

CONTRACT.

• See PLEADINGS AND PRACTICE.

1. *Sufficiency of consideration.* A contract to furnish plaintiff the trade of miners and workmen is sufficiently supported by the consideration that defendant shall receive eight per cent. on all such sales. *George & Chapman v. East Tennessee Coal Company*, 455.
2. *Validity of.* Such a contract is not in restraint of trade, nor immoral nor contrary to law, and is therefore valid. *Id.*
3. *Agreement not to carry on business.* A contract not to carry on one's business any where is void, but a contract not to carry it on in a particular place, or within certain limits, is valid. *Id.*
4. *Damages.* If the contract was made and violated without excuse, plaintiff would be entitled to some damages. *Id.*
5. *May be rescinded. When.* If a party to an executory contract on mutual promises become incapable, except by the act of God or the public enemy, of performing his part of the contract, the consideration of the promises of the other party necessarily fails, and he may rescind the contract, and the party failing to perform can recover nothing on the contract. *Moyers v. Graham*, 57.
6. *Fraud.* It is solely at the option of the party upon whom a fraud is practiced, whether he will be bound by the agreement or not. *Smith v. Greaves*, 459.

CONTRACT—*Continued.*

7. *Avoidance of. Notice of intention.* If one is determined to avoid a contract because of fraud, he must give notice of such determination to the other party within a reasonable time after its discovery. *Id.*
8. *Conditions of laches.* Where an instrument, which does not contain the original intentions of the parties on account of fraud or mistake, is acquiesced in for a period of eight years, with a full knowledge of the existence of such fraud or mistake, the parties are estopped by laches from any attempt to avoid it. *Id.*

CONTRIBUTION.

See SURETY.

CONVEYANCE.

1. *Exception in. What it means.* An exception is the taking of some thing out of the thing granted which would otherwise pass by deed, and it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor in the deed made grantee by the exception. *Coal Creek Mining Company v. J. H. Heck, 497.*
2. *Exception and Reservation. Difference between the terms of no benefit.* Under our system of conveyances, where all instruments are treated as mere contracts, in which the intention of the parties is to be arrived at, the distinction between *exception* and *reservation* is of no importance. *Id.*
3. *Deeds purporting to be interpartes.* A deed purporting to be *interpartes*, by which an estate is conveyed to the grantee, the deed being accepted by the grantee, is held to be the deed of both parties, though only signed by the grantor. *Id.*
4. The legal effect of a conveyance must be to convey all the right owned at the time of making the instrument, whether in contract or by deed of conveyance, and that whether there is or is not a warranty of title, either general or special. *Id.*
5. *Description of.* In a deed of conveyance it is sufficient to identify the land with reasonable certainty, and this is all that is required. *Smith v. Greaves, 459.*

CORPORATIONS, MUNICIPAL.

See SCHOOLS; TAXING DISTRICTS.

1. *Forfeiture of charter.* Third parties cannot, under our laws, enforce the forfeiture of a charter. The State grants it and alone can take it away, but other parties in dealing with such corporations may inquire into their powers and obligations. *State v. Butler, 104.*

CORPORATION, MUNICIPAL—*Continued.*

2. *Transfer of franchises.* A transfer of a mere charter conferring a franchise on certain persons to conduct a banking business, with which was granted immunity from other taxation than that expressly stipulated in the charter, does not convey the franchise to the transferee. A franchise is a right or privilege conferred by law, and is personal to the grantees, and cannot be transferred without the consent of the grantor. *Id.*
3. *Ultra vires.* The charter of the city of Nashville providing the compensation of the mayor shall be \$2,400 per annum, and may be changed by ordinance, but not during his term of office, an ordinance of the city council providing that after the expiration of the term of the then mayor, the mayor shall serve without compensation, was *ultra vires* and void. *State, ex rel., Kercheval, v. Mayor, etc., of Nashville, 697.*
4. *Estoppel.* The mayor elected after the passage of said ordinance was not estopped from claiming salary by the fact that he knew of said ordinance abolishing the salary, nor by any statement he may have made to the electors while a candidate, that if elected he would serve without compensation. A promise by a candidate to serve if elected without compensation might be a ground for his removal, but will not estop him from claiming the salary of the office. *Id.*
5. *Sale of franchises under a mortgage.* The purchasers of the property and franchises of a corporation at a foreclosure sale, under a mortgage authorized by the charter, who, with a view of perfecting a reorganization of the corporation under the charter, meet together, elect officers and directors in conformity with the charter, and proceed to exercise the franchises of the corporation, under the name of the original company, for the purposes specified in the charter, do not thereby become the corporation, or make themselves or their property liable for the debts of the old corporation. *Memphis Water Company v. Mages & Co., 37.*
6. *Old and new. Liabilities.* A mere change of the name of an existing corporation, either simply or by way of consolidation with another company, would not affect the liabilities of the corporation, but the creation of a new corporation by the purchasers of the property and franchises of the old corporation, or the voluntary association of such purchasers under the name of the old corporation, would not render the new entity liable for the debts of the old. *Id.*
7. *Same. Same.* A provision of a charter of incorporation that the purchasers of the property and franchises of the corporation, under a foreclosure of a mortgage thereof, shall be vested with all

CORPORATION, MUNICIPAL—*Continued.*

the powers and privileges, and be subject to all the duties and liabilities of said company, merely subjects the purchasers to the burdens and obligations of the charter, and not to the debts of the old corporation. *Id.*

COSTS.

See CRIMINAL LAW.

1. *Justice's fee for issuance of subpoena.* A justice of the peace is allowed in criminal cases twenty-five cents for subpoenaing a single witness, and five for each additional witness. *State v. Henderson*, 274.
2. *Sheriff's fee for arrest: Justice's warrant.* A sheriff or constable is allowed for arresting prisoners in another county upon a justice's warrant, fifteen cents per mile, guarding to place of trial or county jail, no expense of prisoner being allowed. *Id.*
3. *Clerk's fees.* No fee is allowed clerks for copying bills of costs upon the minutes of the court. *Id.*

COUNTY COURT.

See ROAD COMMISSIONERS.

COUNTY LINES.

1. *Estoppel.* By an act of the Legislature a portion of Hancock county was added to Hawkins county, the line running within eleven miles of the county site of Hancock county. *Held*, upon bill filed by Hancock to restore the territory that complainant was not estopped by mere lapse of time, in ignorance of the fact that there was an encroachment upon the constitutional limits of Hancock county. *Hancock County v. Hawkins County*, 266.
2. *Revenue.* Since the passage of the act, until the filing of the bill, the revenues collected from said territory belong to Hawkins county, said territory being within the jurisdiction of Hawkins county. *Id.*

COURT OF OTHER STATE.

Presumption of regularity. Where a judgment rendered by a court of another State is regular upon its face, the presumption is in favor of its validity and regularity. It need not affirmatively appear that the parties were all served with notice. *Ray v. Proffet*, 517.

COVENANTS.

See LEASE.

CRIMINAL LAW.

1. *Joining offenses in indictment.* Counts for obtaining money by false pretenses, and for passing forged paper, may be joined in an indict-

CRIMINAL LAW—Continued.

ment. Different offenses punished by different degrees of severity, differing only in degree, and belonging to the same class of crimes, may be united in different counts under an indictment, especially when the offense is the same, and the several counts are inserted to meet the uncertainty of the evidence, and it is not error for the circuit court to refuse to quash for that reason, or to refuse to compel the prosecutor to elect upon which of the charges he would proceed. *Foute v. The State*, 712.

2. *Venue*. The defendant being sheriff and jailer of Loudon county, enclosed false and fraudulent, altered and forged accounts, sworn and certified to as required by law, in a letter to the comptroller at Nashville, and received in return warrant on the treasurer, which the defendant sent to the treasurer at Nashville, and was paid by check on Bank of Knoxville, and the money was received there by the defendant. *Held*, the defendant was indictable at Nashville for passing forged paper. *Id*.
3. *Defective counts*. When two counts in an indictment are founded on the same facts, and one count is defective and the defendant is convicted, the conviction will be referred to the good count and will stand, if it appears the defendant was not prejudiced in his defense by the defective count. *Id*.
4. *Evidence*. Under an indictment for passing forged bills for jail fees, the passing of other forged bills than those set out in the indictment, may be shown to prove the *scienter*. *Id*.
5. *Evidence*. A defendant, under indictment for a criminal offense, may prove that another person had a motive, or ground for a motive, to commit the offense with which he is charged. *Sawyers, Cartwright and Pete v. The State*, 694.
6. *Res gestae*. When the State proved that one of the defendants was seen on the morning of the day of the homicide going in the direction of W.'s, and was afterward seen returning with another of the defendants riding behind him, the defendants may prove as a part of the *res gestae*, the declarations of said defendants, made at the time, explanatory of their conduct. *Id*.
7. *Alibi*. It was error for the circuit judge to charge the jury that if the proof of an *alibi* was false, the presumption was that the evidence of the prosecution was true. *Id*.
8. *Railroad agent. Ticket office*. It is a good defense to an indictment of a ticket agent at a railroad station, under the new Code, section 2359, for failing to keep open his office for one hour before the departure of a particular passenger train, that the railroad company, with notice to the public, had, by its rules, dispensed with the

CRIMINAL LAW—Continued.

sale and purchase of tickets for that train, and required the passengers to pay the regular ticket fare on the train. *Brady v. The State*, 928.

9. *Practice. Issue.* When the record shows the defendant was brought to the bar of the court in custody of the sheriff, was arraigned upon the indictment and plead not guilty as charged, and for his deliverance put himself upon the country, whereupon to try the said defendant upon his plea of not guilty, came a jury of good and lawful men, etc., and duly elected, etc., "to well and truly try" said defendant upon his plea of not guilty to said charge in the indictment, etc. *Held*, that though informal, it showed a substantial issue. *Baxter v. The State*, 657.
10. *Evidence. Dying declarations.* When the deceased, a feeble old woman, was violently assaulted, on Saturday night, and was unable to articulate for several days, and on the next Thursday expressed her conviction that she would die, and afterward made declarations as to the identity of the assailant, and lived sixteen days after she was assaulted, it appearing she thought all the time she would die. *Held*, the declarations were competent evidence. *Id.*
11. *Practice. Exceptions to evidence must be made in the trial court, and must be specific, or they will not be regarded in the Supreme Court. The rule is the same in civil and criminal cases. Id.*
12. *Evidence.* A party who elicits illegal evidence can not object to it if responsive to the questions. *Id.*
13. *Charge of court. Province of jury.* It was not error for the trial judge to instruct the jury that they should give the dying declarations of the deceased the same force as testimony as if she had given her sworn statement in the form of a deposition, if they believed the witnesses' statements as to what she said. *Id.*
14. *Occasional insanity.* Where the proof shows the defendant was subject to occasional or temporary attacks of insanity, and was visited by one of such attacks shortly before the commission of the offense, and is not shown to have recovered sanity at the time the offense was committed, the law presumes the insane condition to remain as last shown. *Overall v. The State*, 672.
15. *Abducting a female.* When defendant is indicted under the Code, section 5370 (M. & V.), for abducting a female, if the proof shows that the female was unchaste and lewd, the defendant can not be convicted. *Jenkins v. The State*, 674.
16. *Juror. Competency.* A juror is not rendered incompetent to sit on the trial of an indictment for murder, by having heard or read

CRIMINAL LAW—Continued.

in a newspaper that the defendant had killed the deceased about a settlement. *Spence v. The State*, 539.

17. *Same. Newspaper statements.* Newspaper statements in a criminal offense, to disqualify a juror who has read them, must be such as fall within the disqualifying sources of information; any other statement amounting only to rumor, which would not disqualify. *Id.*
18. *Same. Same.* A juror is competent in a trial for murder who states that he has an opinion formed from reading the newspapers and from talk in the neighborhood, which it would require evidence to remove; that he had heard that the defendant had killed the deceased about a settlement, and that was all that he had heard or read; that if taken on the jury he would try the case on the evidence as sworn to by witnesses, and not on what he had read or heard, and would do fair and impartial justice between the State and the defendant. *Id.*
19. *Same. Loose impressions.* Loose impressions or conversations of a juror as to the guilt or innocence of the prisoner, founded upon rumor, would not, if disclosed by him or others to the court when the jury is selected, have the effect to render him incompetent, and, *a fortiori*, if disclosed after verdict, would not be a cause of new trial, a much stronger case being required after than before trial. *Id.*
20. *Motion for new trial.* When a witness, on a motion for a new trial testified that a juror, after he had been summoned, said to him that "they ought to have hung him (the prisoner) at first and saved us the trouble," and that a person named also heard the conversation, and this person and the juror both testified that no such remark was made, and the trial judge overruled the motion, there is no ground for reversal by this court. *Id.*
21. *Defense of insanity.* On a trial for murder, in which the defense was insanity, and there was proof that the prisoner was in the habit of using intoxicating liquors in large quantities, often to excess, but no proof that he was laboring under *mania-a-potu* at the time of the killing, the charge being full upon the subject of insanity from any cause, and of the effect of intoxicating liquors on the grade of homicide, it is not error to refuse the following special request: "If the jury believe from the evidence that the defendant, at the time of killing, was insane, or was laboring under the disease of *mania-a-potu*, produced by the use of intoxicating liquors, then he should be acquitted." *Id.*
22. *Same. Burden of proof.* The jury having found that the defendant was not insane, and the trial judge having refused a new

CRIMINAL LAW—*Continued.*

- trial, the burden is upon the defendant in this court to show that there is a preponderance of evidence in favor of the defense. *Id.*
23. *Same. Evidence.* Isolated incidents, scattered through several years, introduced to show insanity, which might be attributed to the excessive use of liquors, and more continuous acts not necessarily signs of insanity, amount to little where the defendant up to the day of homicide transacted business, traded and was traded with, and mixed in social intercourse with his neighbors and the community as a sane man, many of his friends of daily intercourse testifying that the idea of his insanity never crossed their minds. *Id.*
24. *Turnpike company.* The Code, section 4918 (new Code, section 5751), uses the word toll-gate for the road on which the gate is erected, and makes it an indictable offense to fail to keep the road in repair as required by law and the terms of the charter. *Fayetteville & Columbia Turnpike Company v. The State*, 578.
25. *Same.* A turnpike corporation, and its proprietors, may be prosecuted criminally, under the Code, section 4918, for failing to keep the road in proper repair, notwithstanding the provisions of the statute requiring the appointment of superintendents of turnpikes, with power to report upon the condition of the road, and throw open the gates. *Id.*
26. *Putting obstructions on railroad track.* Where defendant placed obstructions on railroad track for the purpose of getting a job or reward for notifying the railroad of the obstruction, and signaled the train and had it stop before it struck the obstruction. *Held*, he was guilty under the statute (new Code, sec. 5387), of wilfully and maliciously placing obstruction on the railroad track. *Crawford v. The State*, 343.
27. *Evidence.* Where witnesses, to establish an *alibi*, prove that defendants stayed at the house of K. on the night of the murder, and that K. was at home that night, and in the jurisdiction of the court at the trial, it is competent for the defendant to show that the mental condition of K. was such that he could not be introduced as a witness. *Hoard and Kite v. The State*, 318.
28. *Same.* The State having introduced witnesses to sustain the general character of certain State witnesses, the defendant may introduce counter-vailing witnesses as to the general character of said State witnesses. *Id.*
29. *Judge may state evidence. Practice.* While it may not be reversible error for the court, upon controversy between counsel in argument, to state that a witness did not make a certain statement, yet in view of the possibility of the judge, during a long and tedious trial, fail-

CRIMINAL LAW—Continued.

- ing to hear or remember all the testimony, it is the better practice to have the witness recalled. *Id.*
30. *Juror. New trial.* Where a motion for a new trial based upon the affidavit of two reputable witnesses, that a juror had formed and had expressed an opinion as to the guilt of the defendants before his selection as a juror, it is made to appear to the court that the juror, upon a former trial, heard the evidence of a most important witness, and admitted that he had a conversation with affiants at the time and place stated by them, and "thinks it probable he did say that if the proof was sufficient to hang them, they ought to be hung, or if the proof showed them guilty, a juror ought to have gizzard enough to convict, or something to that effect," the court should grant a new trial, although the juror may state further that he had not formed or expressed any opinion when selected as a juror. *Id.*
31. *Selling liquor. Evidence.* Upon the trial of defendant on an indictment for selling liquor within four miles of an incorporated institution of learning, where it appeared the trustees, by writing, had leased the school to the teachers, and by said lease no right of supervision or control was reserved. *Held*, it was competent for the State to prove by parol that the trustees still retained the supervision and control over said school. While it might be incompetent as between the lessors and lessees to admit the parol proof, yet the defendant can not rely upon the objection. *Harrison v. The State*, 720.
32. *Costs. Work-house.* A prisoner convicted of a felony, whose punishment has been commuted to imprisonment in the county jail, may be required to work out the costs of the State, adjudged against him, in the county work-house, after his term of imprisonment has expired, if not otherwise paid or secured. *Eaton v. The State*, 200.
33. *Larceny. False pretense.* Where goods are obtained by stratagem, artifice or fraud, it is larceny where the owner intends to part only with the temporary possession, for a limited time or specific purpose, retaining the ownership in himself, and it is obtaining goods by false pretense where the owner intends to part with the property absolutely. *Collins v. The State*, 68.
34. *Attempt to commit larceny.* Under section 5379, new Code, an indictment for attempt to commit a larceny is good, and the same particularity in the description of the property attempted to be stolen is not required as in an indictment for larceny. *Hayes v. The State*, 64.
35. *Larceny.* An indictment is sufficient, which, in the usual form of an indictment for larceny, charges the defendant with stealing "one railroad ticket from Knoxville, Tennessee, to Washington, D. C., of the value of seventeen dollars," the property of the prosecutor. *Millner v. The State*, 179.

CRIMINAL LAW—*Continued.*

36. *Homicide.* Ordinarily, if a party assaulted kills his adversary in the conflict, he will be guilty of manslaughter only, the presumption being that the assault has excited his passion beyond control, and that he acts from sudden heat of passion and not from malice. But if the resistance of the assault is made by a deadly weapon, and the weapon is used in a cruel manner, not at all justified by the nature and danger of the assault, the offense amounts to murder. *Fitzgerald v. The State*, 99.
37. *Jury. Verdict.* Where one of the jurors proposed that each juror should cast a ballot with the number of years he was in favor of written upon it, and the numbers added together and divided by twelve, which was accordingly done, and the result was fifteen years and nine months, and thereupon said juror said it was not customary to return verdicts for fractions of years, and proposed to add on three months, which was agreed to. *Held*, that the verdict was not the deliberate judgment of each juror upon the evidence produced by argument and reflection, but was the result of chance, and a new trial should be granted. It makes no difference that three months were added, as they were added solely because of the statement of a juror that it was not customary to return verdicts for parts of years. *Williams v. The State*, 129.
38. *Jury. Verdict. Not gambling. When.* Where a jury added together the number of years which each thought the prisoner should be confined in the penitentiary, and divided the aggregate by twelve, and the result was agreed upon and returned by the jury, the verdict was not a gambling verdict, there being no agreement or understanding, expressed or implied, before the aggregation and division, that the result should be their verdict. It is the fact of an agreement or understanding before the result is adopted that vitiates the verdict. *Glidewell v. The State*, 133.
39. *Evidence of physical peculiarity.* On a question of physical peculiarity of a prisoner, a witness who had recently or immediately examined the prisoner, is competent to testify as to what he had seen. If there be doubt as to the correctness of the testimony of such witness, a physician, if deemed best, under orders of the court, may examine the prisoner. *Lipes and Gamble v. The State*, 125.
40. *Preponderance of testimony.* After verdict and refusal of new trial by the trial judge, the presumption of innocence is gone, and in order to a reversal by the Supreme Court, a decided or clear preponderance of testimony against the verdict must appear in the record. *The State v. Collins*, 434.
41. *New trial. Competency of juror.* Upon a motion for a new trial on the ground that a juror had expressed an opinion before he was ac-

CRIMINAL LAW—*Continued.*

cepted as a juror, the trial judge having heard the proof, and having better knowledge of the witnesses, has far better means of deciding on the weight of what they deposed to, than the Supreme Court can have. *Id.*

42. *New trial.* After a trial on the merits in a criminal case, upon the plea of not guilty, the defendant is not entitled to a new trial, or to a reversal of the judgment, for any causes enumerated in section 6083 of the new Code, even if two or more of them be found to exist, and the cases of *State v. Davidson*, 2 Cold., 184, and *Thurston v. State*, 3 Cold., 115, holding otherwise, are overruled. *King v. The State*, 51.

43. *Evidence.* Proof of the finding of postal cards, addressed to the defendant, at a place where the State sought to show that the defendant was about the time of the commission of the offense of arson, was properly admitted over the objection of the defendant, the court stating to the jury at the time, and again in his charge, that the proof would amount to nothing unless they should find that the defendant had possession of them beforehand, and left them at the place. *Id.*

44. *Charge of court.* The trial court cannot be put in error for failing to explain to the jury the law as to the fabrication of evidence, when no request was preferred to him to make such a charge, and when it does not appear that any such point was made in the court below, unless, indeed, the court could see that the defendant was seriously prejudiced by the omission. *Id.*

45. *Preponderance of evidence.* After verdict, and the refusal of the trial judge to set it aside, this court will not reverse on the facts unless the evidence preponderates against the verdict. *Id.*

DAMAGES.

See RAILROAD; TRESPASS; PLEADINGS AND PRACTICE; CONTRACT; ATTORNEY, POWER OF.

DEED.

See FEME COVERT.

DEMURRAGE.

See RAILROAD.

DIVORCE.

See HUSBAND AND WIFE.

DOWER.

See PARTITION.

DOWER—Continued.

A widow residing in another State, who seeks dower of land in this State devised by the will of her husband, and who is required to account under a deed of separation and settlement for property of far more value than the dower, cannot recover dower if she admits that she has parted with the property, and cannot account for it. *Chaney v. Bryan*, 589.

ELECTION.

See HUSBAND AND WIFE; VENDOR AND VENDEE.

EMPLOYEE.

See RAILROAD.

ESTOPPEL.

See BOND, DELIVERY; CORPORATIONS; CONTRACT; COUNTY LINES.

EXCEPTION TO AWARD.

See ARBITRATION.

EXCEPTION AND RESERVATION.

See CONVEYANCE.

EXECUTION OF LEVY.

Personalty. Released by injunction. The levy of an execution on personalty is released by an injunction from the chancery court, either at the instance of the debtor, or of a third person. *Telford v. Cox*, 298.

EXECUTORS.

1. *Claims of executors. Statute of limitations.* The will contained a clause which gave the executors power "to pay, if they see proper, just debts barred by the statute of limitations." This can only apply to claims of third parties against the estate, and not to debts or claims in favor of the executors themselves. This would be to make the executors judges in their own cases. *Williams v. Williams*, 438.
2. *When and where claims of executors to be filed.* Executors have no right to waive any statute of limitations in their own favor, or either of them, without a most definite purpose expressed by the maker of the will. The representative must retain for his own debt within two years and six months, and this must be manifested, either by settlement in the county court of his administration account, or some other unequivocal act of appropriation. *Id.*
3. *Provision of forfeiture.* Executors can not insist on a forfeiture. Where a will contains a provision of forfeiture of all interest in the estate on the part of one who contests the will, and the will makes no gift

EXECUTORS—Continued.

over in case of forfeiture, then the executors can not insist on a forfeiture, if waived by the devisees and legatees. This would be to permit them to force a possible benefit on parties, who, having ample opportunity to assert their own rights, have declined to do so. *Id.*

EXEMPT FROM JURY SERVICE.

See CONSTITUTIONAL LAW.

EVIDENCE.

See PLEADINGS AND PRACTICE; ARBITRATION; CRIMINAL LAW; PARTNERSHIP.

Letter. Neither an original letter, nor a certified copy thereof, from the Commissioner of Internal Revenue, in answer to certain inquiries, is evidence of the facts therein stated. *Moyers v. Graham*, 57.

FEES.

See COSTS; SHERIFF; WITNESS FEES.

FELLOW-SERVANT.

See RAILROAD.

FORGED DEED.

See PLEADINGS AND PRACTICE.

FORFEITURE.

See CORPORATIONS; EXECUTORS.

FRAUD.

See CONTRACT; CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE.

FRANCHISES, SALE.

See CORPORATIONS.

GRANT.

See RIVERS.

Appurtenances. The grant of a spring carries the land containing it, including so much of the land as is essential to the enjoyment of the spring in the customary way, but does not include a tree ten feet from the head of the spring on the land of another person, although the roots of the tree extend to, and partially around, the spring, and the branches overhang it. *Lucas v. Bishop*, 165.

GUARDIAN AD LITEM.

See CHANCERY PLEADINGS AND PRACTICE.

GUARDIAN AND WARD.

See CHANCERY PLEADINGS AND PRACTICE.

HOMESTEAD.

1. *Power of husband to alienate.* The husband cannot alienate the homestead without the consent of the wife, nor can he deprive her of her right to its use by his wrongful act. *Rhea v. Rhea*, 527.
2. *Same. Whom the alienation affects.* The husband's conveyance is operative against himself alone and does not affect the rights of the wife. *Id.*
3. *In what lands the wife may claim homestead.* Since the act of 1879, the wife may assert her claim to homestead to any lands to which the right attaches under the act, unless she has divested herself of the right by joining the husband in the conveyance of it in mode prescribed by statute. *Id.*

HUSBAND AND WIFE.

1. *Liability of husband for debts of wife.* Prior to the act of 1877, the liability of the husband for the debts of the wife attached and was fixed at once upon marriage, and where the marriage was consummated before said act, its passage did not relieve the husband of the debts of the wife due at date of marriage. *Taylor v. Roundtree*, 725.
2. *Decree for divorce.* If a decree of divorce, granted by the courts of another State, is relied on in this State in bar of the rights of the wife or widow, she may contest the validity of the same by showing the want of some jurisdictional fact, although in contradiction of the recitals of the record. *Chaney v. Bryan*, 589.
3. *Deed of separation. Void. When.* A deed of separation between husband and wife, and settlement of property by the husband on the wife during coverture, acted on by all parties until the husband's death, is void at the election of the wife; but if she elect to avoid the settlement it becomes void as to the husband, and she must account for the property conveyed which was not expended for her support and maintenance during the coverture. *Id.*
4. *Same. Same.* The property must be accounted for to the husband's estate for the benefit of whom it may concern, and a devisee of the husband may require such an account as well as the heir. *Id.*
5. If husband attempt to sell his wife's land, same is void, and the purchaser, if put in possession, is at most but the tenant of the husband, whose entry and possession is not a disseizin of the wife, if it is of the husband. In such case the *bona fide* purchaser is entitled to compensation for permanent improvements made before the filing of the bill to set aside the conveyances to the extent the value of the land is enhanced at the time of the surrender of possession, and will be charged with rents from the death of the husband, but is not entitled to lien on the land for purchase money paid the husband. *Garth and Buckman v. Fort*, 683.

IGNORANCE OF LAW.

Postal regulations. As to postmasters and agents of the Post-office Department, the general postal regulations are not facts but law, and agents and employes of said department will not be allowed to predicate actions upon ignorance of same. *Railroad Company v. White*, 340.

INSOLVENT ESTATE.

See CHANCERY JURISDICTION.

INSURANCE, FIRE.

See LEASE.

INTEREST.

See ADVANCEMENTS; WILLS.

JUDGES, SPECIAL.

Salary. Constitutional Law. The act of 1877, chapter 135, which provides "that hereafter, when by reason of the incompetency, sickness or other cause, any judge or chancellor of the inferior courts shall be unable to hold his courts, and a special judge shall be appointed or elected, said special judge shall receive no compensation from the State, unless in the recommendation or certificate of the regular judge or chancellor for the appointment of such special judge or chancellor, he shall expressly authorize the said judge or chancellor to be paid out of his regular salary," is constitutional. *Pickard v. Henderson*, 430.

JUDGMENT.

See COURTS OF OTHER STATE.

JUDGMENT, VOID.

See CHANCERY PLEADINGS AND PRACTICE.

JUROR.

See CRIMINAL LAW.

LACHES.

See CONTRACT.

LEASE.

1. *Covenants.* A covenant for quiet possession is not broken until eviction, actual or constructive. *Hayes v. Ferguson*, 1.
2. *Same. Constructive Eviction. Rescission.* Where, under the same instrument, two distinct tracts of land, a large and a small tract, were leased for a series of years at a rental of so much per acre of tillable land a year, the lessors covenanting for quiet possession, the smaller

LEASE—*Continued.*

tract being in litigation, which fact the lessees knew, and during the time the lessors lost the suit, whereupon the lessees abandoned the lands, and notified the lessors that they had rescinded the contract, contrary to the wish of the lessors, who stated to the lessees that they should be protected in their possession: *Held*, 1. That the losing of said suit did not constitute a constructive eviction. And 2. That an actual eviction of the smaller place would not have warranted a rescission of the contract, but an abatement of the rent. *Id.*

3. *Fire Insurance.* During a lease of real estate, providing that if the buildings, or any of them, be destroyed by fire, the lessees "are to erect at their own expense such buildings as will answer their purpose," fire insurance policies on the gin house, etc., were issued to the lessors, but made payable to the lessees, who paid the premiums, and the insured property was destroyed by fire during the time, when the lessees collected the money on same, but declined to apply it to rebuilding the property destroyed by fire: *Held*, 1. That the lessors were entitled to recover of the lessees the amount collected by them on the policies, and that such provision in a policy of insurance merely designates the person to whom the loss is to be paid, and shows that he is a person who *may have* an interest in its being so paid, and that such stipulation has no more effect upon the contract of insurance than a stipulation that the loss, if any, should be deposited in a specific bank to the credit of the party insured. 2. That the lessees were not entitled out of the proceeds of the policies of insurance to the loss of the use of the gin, etc., for the balance of the term after the destruction of the property by fire. *Id.*
4. *Abandonment. Receiver. Compensation.* After the abandonment of the lands by the lessees the lessors sued the lessees and applied for a receiver to rent out the lands, and by consent of the parties a receiver was appointed: *Held*, the lessees should pay the compensation of the receiver. *Id.*
5. *Surveyor. Compensation.* In order to find out the amount of tillable land rented, a surveyor was employed to ascertain same: *Held*, the lessors should pay the surveyor's fees. *Id.*

LEGATEES.

See WILLS.

LEGISLATIVE POWER.

See RECEIVER.

LIEN.

See HUSBAND AND WIFE; PARTNERSHIP; RAILROAD.

1. If the tenants in common or co-owners of property sell their shares severally, each has only a lien on his share for his part of the purchase money. *Bank v. Bradley*, 279.

LIEN—*Continued.*

2. *Vendor and vendee.* Under a contract for the sale and purchase of land, in which it is agreed that the purchaser had advanced money to the vendor and taken security therefor in the shape of assignments of debts paid by the advances with their liens and a trust assignment of the vendor's interest in the property, with an express stipulation that the vendee may become the purchaser of the property by a given day, in which event the advances are to be credited upon and deducted from the gross amount of the purchase money, and the vendee elects to take the property, the assignments and liens and trust deed are thereby extinguished, and no creditor of the vendee could, in the absence of contract, acquire any right to the debts so assigned and their liens. *Id.*
3. *Cannot be revived after payment.* If a debt, which is a lien on realty, be once paid by the debtor, the lien cannot afterwards be revived to the prejudice of third persons by the creditor and debtor. *Id.*
4. *Not lost. When.* An express lien on land for the purchase money, retained on the face of a deed of conveyance or by the decree of the court under which the land is sold, is equivalent to a mortgage lien, and is not lost by recovering judgment upon the purchase notes, and issuing execution thereon. *Id.*
5. *Vendor and vendee. Levy and sale.* An attachment lien on land contracted to be sold, levied on as the property of the vendee, is subject to the payment of the purchase money, and a similar levy on the land as the property of the vendor reaches nothing, he holding the legal title in trust for the vendee. *Id.*

LIEN, MECHANIC.

On personal property. A mechanic employed by an owner of a portable engine, boiler and appurtenances, to take the same down from one place and remove and erect them temporarily upon the land of another, is not entitled to a lien either upon the land or the machinery. *Truzall & Dummeyer v. Williams & McCallie*, 427.

LIMITATION.

See EXECUTORS; CHANCERY PLEADINGS AND PRACTICE; TENANTS IN COMMON.

Interference between titles. Bar by statute. The possession of land so as to produce a bar under the statute must be an actual possession of some part in dispute. Where there is an interference between titles, if one of the adverse claimants is in possession of the land within the boundaries of the grant, but not on any part of the interlap, the statute does not begin to run. But the moment he occupies the land included in the other's grant and holds possession, either by himself or another, the statute commences to run. *Coal Creek Mining Company v. Heck*, 497.

LOAN AND EXCHANGE OF PROPERTY.

See WAREHOUSE RECEIPTS.

LOST DEED.

See CHANCERY PLEADINGS AND PRACTICE.

LOW WATER MARK.

See RIVERS.

MARRIED WOMEN.

1. *Conveyance by. Defective acknowledgment.* A deed of a married woman, even though registered upon a defective acknowledgment, in that form would be notice to no one, she alone conveying in the deed and the husband joining for conformity, but giving no warranty. *Coul Creek Mining Company v. Heck*, 497.
2. *Same. Effects as against intervening purchasers.* The deed of a married woman only takes effect as against intervening purchasers when it is properly acknowledged and registered, but it can not relate by amendment so as to affect them. *Id.*
3. *Privy examination.* If proper privy examination was made and an improper certificate made by mistake, same may be corrected; but if proper examination was not made, it cannot be cured. It is not incompetent for the officer to testify that the proper privy examination was not taken. *Garth and Buckman v. Fort*, 683.

MASTER AND SERVANT.

Extra services. Where the servant voluntarily performs extra services, and the servant gives the master no notice of any intention to claim compensation for same, but settles with him statedly under his original contract, the law will imply no contract and give no compensation for said extra services. *Railroad Company v. McKnight*, 336.

MESNE PROFITS.

See CHANCERY PLEADINGS AND PRACTICE.

MILITIA.

See CONSTITUTIONAL LAW.

MINING.

See TRESPASS.

MISNOMER.

See PLEADINGS AND PRACTICE.

MISTAKE.

Mistake as to the legal effect and consequences of an act is not ground for relief in equity. *Boyce v. Stanton*, 346.

MORTGAGE.

See CORPORATION; PARTNERSHIP.

MORTGAGE, PRIORITY.

After acquired title by junior mortgagee. B. had a prior and A. a junior mortgage upon a tract of land executed by S. A. afterwards bought the interest of S. and redeemed the land from the State which had purchased at tax sale. A. claimed to hold the land under the tax deed free from incumbrance of B.'s mortgage. *Held*, that by purchasing the title to the land acquired at tax sale, he could not thereby overreach the prior mortgage of B. *Boyd v. Allen*, 81.

MORTGAGE OF MERCHANDISE.

When void. A mortgage of merchandise is fraudulent and void if it appear, either on the face of it or by other proof, either direct or circumstantial, that it was the intention at the making of it, that the mortgagor should keep possession with the right and power of disposing of the mortgaged goods. *Bank v. Haselton*, 216.

MORTGAGEE.

See VENDOR AND SUB-PURCHASERS.

NEGLIGENCE.

See RAILROAD.

NON-RESIDENT.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE.

NOTICE.

See ASSIGNMENT.

PAROL PROOF.

See REGISTRATION.

PARTNER, SURVIVING.

See PARTNERSHIP.

PARTNERSHIP.

1. *Partnership debts. Evidence. Admissions of partner.* A note executed by one member of a firm for money borrowed upon the credit and for the benefit of the partnership, is a partnership debt, and a writing by the other partner that the money was so used, and the debt was a partnership debt, is competent evidence in a suit between creditors of the partnership. *Anderson v. Norton*, 14.
2. *Surviving partner. No power to give preference.* A surviving partner has no power by deed of trust on partnership property, to give one creditor preference over another. *Id.*

PARTNERSHIP—*Continued.*

3. *Mortgage to secure individual debts. Priority.* A mortgage executed by the members of a firm, upon the real estate of the firm to secure an individual debt of a partner, free from fraud or collusion, creates a prior lien to partnership debts. *Id.*
4. *Capital.* Under an agreement of partnership for one year, in which it was stipulated that one partner had put in \$1,000 to constitute a common stock to be used in buying goods, etc., and that the other should give his entire personal attention and the benefit of his experience to place against the cash furnished, the partners to bear the expenses and losses jointly, and share the profits equally, the partner who gives his attention and experience is not entitled, upon dissolution, to one-half the cash capital advanced by the other. *Shea v. Donahue*, 160.

PARTITION.

See ATTORNEY'S FEE.

1. *Heirs. Right of the parties.* Heirs, between whom partition of lands descended has been made, take in severalty the estate allotted, with the rights, privileges and incidents inherently attached to it; and therefore one heir to whom has been allotted the upper part of a farm on a river, through the whole of which farm a ditch for the purpose of drainage had been dug and kept open by the common ancestor, is entitled to have the ditch kept open through the lower allotment of a part of the farm to another heir. *Powell v. Riley*, 153.
2. *Dower. Presumption of law.* Under a voluntary partition between a widow and her two children, of land descended from the husband and father, in which the widow receives one-third, including the dwelling-house and improvements, the presumption of law would be that the widow's allotment was in dower, and the execution by the parties at the time of a penal bond to abide the division would only strengthen the presumption. *Cloyd v. Cloyd*, 204.
3. *Commissioners. Duty.* The duty of commissioners appointed to make a partition is to make partition of the land in kind exactly equal in value if possible, and if this cannot be done, then as nearly equal as they can. *Burdett and Wife v. Norwood*, 491.
4. *Same. Same.* The commissioners in partition, under the Code, section 3283, which authorizes them, if exact partition cannot be made without material injury to the parties, or some one of them, to charge the larger shares with the sums necessary to equalize the shares, cannot compel an unwilling party to pay money, or part with any portion of his land for money unless the exigency of the statute is shown to exist by their report of the facts. *Id.*

PARTITION—*Continued.*

5. *Same. Same. Report.* The report of commissioners in partition is in the nature of a special verdict, and must state facts, not mere conclusions, so that the court may judge of the sufficiency of the reasons assigned for the action. *Id.*
6. *Same.* A family settlement by which the realty of infants is changed into money, cannot be made in a suit for the partition of land, through the commissioners appointed to make partition. *Id.*

PLEADINGS AND PRACTICE.

See RAILROAD.

1. It is not error for the court to refuse to recall a jury upon request of counsel for a further or additional charge without valid or reasonable grounds being shown. *Bowling v. Railroad Company*, 122.
2. *Contract. Quantum meruit.* To recover upon a *quantum meruit*, where the party suing has violated the contract, he must show the performance of services, and that those services were of benefit to the other party. *Moyers v. Graham*, 57.
3. *Revivor. Scire facias.* Where a party to a suit dies and *scire facias* is ordered as against the administrator and heirs of the deceased, naming them, except one heir, and the writ issued and was served upon the administrator and all the heirs, naming them, the revivor is valid. *McCracken v. Nelson*, 312.
4. *Same. Misnomer.* If the *scire facias* is served upon an heir, and in the return of the officer the true name is not given, proceedings based thereon are not void. The heir being served by one name, should have pleaded in abatement for misnomer, and the error would have been corrected. *Id.*
5. *New trial. Affidavit. Personal examination.* The court may order a party who has made an affidavit in support of a motion for a new trial, before the court, to be personally examined with respect to the statements in his affidavit. *Glidewell v. The State*, 133.
6. *Evidence.* If one party call for a conversation from one of the interlocutors, the opposing party may call for the same conversation from the other interlocutor, so as to have it fully before the jury, and a general objection would be of no avail if, in fact, the testimony of both witnesses is in substantial accord. *Knoxville Iron Company v. Dobson*, 409.
7. *General objection to testimony.* A general objection to the admission of testimony, if good at all, goes only to substance, and will be of no avail if the evidence be merely irrelevant or innocuous. *Id.*
8. *Statute prohibiting more than two new trials applies to Supreme Court.* The statute which prohibits the granting of more than two new trials

PLEADINGS AND PRACTICE—*Continued.*

at law necessarily applies to the Supreme Court, which only renders the judgment that the court below should have rendered. *Id.*

9. *Writs of error.* Section 3905 of the Code. To what cases it applies. Section 3905 of the Code which grants a writ of error when an appeal in the nature of a writ of error has been dismissed because the record has not been brought up in time, applies to cases in which the appellant brings up the record. *Thomas v. Railroad Company*, 533.
10. *When appellant refuses to bring up the record after appeal.* When the appellant refuses to bring up the record, after he has been granted an appeal, the appellee may bring it up and obtain an affirmance of the judgment. *Id.*
11. *Action for damages.* The courts of law, trammelled by their forms of action and the principles on which they were supposed to rest, such as title in replevin and conversion in trover, have found it difficult to adopt a rule which would lead to uniformity in the recovery of damages for the same wrong, but show a growing inclination to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is to give just compensation for the injury, which has always been the rule of equity. *Ross v. Scott*, 479.
12. *Damages.* The weight of authority now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance, and not wilful, the damages will be confined to the value of the property before the trespass was committed. *Id.*
13. *Same. Rents and improvements.* When, therefore, the defendant in good faith, under an honest belief of title, mined coal on land only valuable for the coal, and cut timber for the purpose of erecting houses on the land and making props for the mine, he was held liable for the value of the coal *in situ*, and for the timber as trees, and for the rent of the houses erected, but allowed the permanent enhancement of the land by reason of the improvements. *Id.*
14. *Forged deed.* The fact that there is a forged paper as a link in the defendant's title, containing on its face marks of suspicion, is a circumstance to be looked to in determining the question of good faith, but not conclusive upon him as matter of law. *Id.*
15. *Continuance.* Where at the eighth trial term the affidavit for continuance by plaintiff in error stated that until recently the absent witness had been in a certain place in the State, and it had taken out subpoenas for him and had sent them to the counties in which it supposed he might be found, and had just learned he was in the State of Texas, and it was not shown that any effort had been made at any previous time to procure the attendance or deposition of the witness, and it appeared the company knew all the time the

PLEADINGS AND PRACTICE—*Continued.*

materiality of the facts it alleged it could prove by him, he being the engineer on the train to which the accident occurred, it was not error to refuse the continuance. *Railroad Company v. Johnson*, 677.

16. *Evidence.* In a suit against a railway company for damages to a passenger, for negligence, and unsafe condition of the cars, road-bed, rails, cross-ties, etc., it was not error to allow proof by the defendant in error as to the condition of the track for a short distance on either side of the place of the accident; and it is competent to show that the section boss permitted part of his road to be in bad condition, in determining his negligence and want of skill. *Id.*

17. *Compromise of debts.* If a creditor, under a compromise arrangement with other creditors and the debtor, accept part of his demand in full of the whole, the claim to the remainder is extinguished, and such unpaid part will neither sustain a suit nor form a sufficient consideration for a new promise by note. *Evans, Fife, Porter & Company v. Bell*, 569.

18. *Same.* Such a note cannot be sustained upon the ground that it was given to avoid litigation, when the proof shows that the party to whom it was given had taken no step to commence litigation, nor made any threat to that effect, although another creditor had prepared a bill by himself alone, against the debtor alone, apparently with the intention of filing it. *Id.*

19. *Same. Fraud.* No one or more creditors to a composition arrangement by all the creditors with a common debtor can, upon the pretense or ground of fraud on the part of the debtor in the settlement, secure a benefit to himself, at any rate without proof of fraud sufficient to set aside the composition as to all the creditors, and then only, perhaps, by setting aside the composition releases by proper proceedings. *Id.*

20. *Judgment against non-resident.* By the law of this State a judgment against a non-resident by attachment of property without service of process or publication, as required by statute, is void, and no proof *aliunde* is admissible to show publication, the record itself being silent on the subject. *Byram v. McDowell*, 581.

21. *Annuity. Mortgage.* When two persons agree to pay an equal annuity to a third person, each securing the payment of his moiety by mortgage of realty, with a stipulation that at the death of the annuitant and the payment of funeral expenses, any part of the annuity remaining should be equally divided between them, the annuitant is entitled to the annuity from each, and to enforce the mortgage against either, and it is no defense that the annuitant has failed to make the other party pay, the right to the surplus, if any, only accruing after the death of the annuitant. *Smith v. Smith*, 93.

PLEADINGS AND PRACTICE—*Continued.*

22. *Revivor. Personal representative.* After a decree for the arrears of an annuity rendered in this State in favor of a non-resident, upon a contract made in another State, if the annuitant die pending an appeal to this court, the suit may be revived by the personal representative of the annuitant, and such representative may be appointed by the county court of the county in which the decree was recovered. *Id.*

POSSESSION, ADVERSE.

See TENANTS IN COMMON; TENANCY BY CURTESY; LIMITATION.

POSTAL REGULATIONS.

See IGNORANCE OF LAW.

PRESUMPTION OF LAW.

See PARTITION.

PRINCIPAL AND SURETY.

1. *Previous indebtedness.* A failure to disclose to the sureties the previous indebtedness of their principal, when not requested to do so, is no evidence of fraud. *Sewing Machine Company v. Jackson, Atkin and Gaut*, 418.
2. *Discharge of surety.* To hold the surety was discharged because of the omission of the creditor to advise him of the previous transactions between the debtor and creditor, in the absence of any inquiry on the subject, would establish a rule that would make instruments requiring a surety of little value. *Id.*
3. *Liability caused by act of creditor.* If by any act of the creditor the surety's liability is increased beyond what it was at the time he became bound, he will be discharged. *Id.*
4. *Concealment. When it is fraudulent.* Concealment or failure to disclose becomes fraudulent only when it is the duty of a party, having knowledge of the facts, to disclose them to the other party. *Id.*
5. *When it is one's duty to disclose.* All the instances, in which the duty to disclose exists, and in which a concealment is therefore fraudulent, may be reduced to three classes:
 1. Where there is a previous definite fiduciary relation between the parties.
 2. Where it appears one or each of the parties to the contract expressly repose a trust and confidence in the other.
 3. Where the contract or transaction is intrinsically fiduciary, and calls for perfect good faith. A contract of insurance is an example of this class. *Id.*

PRINCIPAL AND SURETY—*Continued.*

6. *Non-disclosure in insurance cases.* The strict rule in respect to non-disclosures, applied in insurance cases, does not extend to the contracts of suretyship and guaranty. *Id.*
7. *Disclosure. Duty when inquiry is made.* If inquired of, the creditor is bound to answer truthfully. But not being asked, he is not forced to disclose any circumstance in connection with the particular transaction in which he is about to engage which will render the position of the surety more hazardous, or to inform him of any matter affecting the general credit of the debtor. *Id.*

PRIORITY.

See MORTGAGE.

PRIVY EXAMINATION.

See MARRIED WOMEN.

PUBLIC ROADS.

See ROAD COMMISSIONERS.

PUBLICATION.

See STATUTES.

PURCHASERS.

See TENANTS IN COMMON.

RAILROAD.

1. *Passengers entitled to safe place to alight from train.* A station being called by the conductor of a railroad train, and the passenger told to get off, there being no light or assistance offered, had a right to rely upon the directions of the conductor, and to presume that he was at the usual place of getting off, and that there was at that place a safe and suitable place to alight from the train. *Railroad Company v. Connor and Wife*, 254.
2. *Employee.* An action for damages for a personal injury, caused by collision with the moving train of a railroad company, under the provisions of the Code, sec. 1166, *et seq.*, will not lie in behalf of a servant or employe of the company, whose negligence caused, or contributed to cause, the accident or collision occasioning the injury. *Railroad Company v. Rush*, 145.
3. *Same. Fellow-servants.* Several employes of a railroad company, although of different grades, when employed in a common service, are fellow-servants within the rule that a servant undertakes to run the risk of injuries from the negligence of his fellow-servants. *Id.*
4. *Same. Same.* An engineer on a moving passenger train, and a brakeman on a freight train, of the same company, at a depot,

RAILROAD—*Continued.*

who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train, are fellow-servants for the purpose of bringing the train safely into the depot. *Id.*

5. *Same. Pleading and practice.* A brakeman employed to give a danger signal, who goes to sleep on the roadway, and is injured by the train he is sent to signal, cannot sue the company for damages under the Code, sec. 1166, *et seq.* *Id.*
6. *Negligence.* A conductor agreeing to put a passenger off at a station is bound to stop the train at that place, so that the passenger can get off in safety, even though his ticket is only to the last station passed before reaching it, additional fare being receivable if demanded, but the mere agreement and duty to stop, and the ringing of the bell by the conductor is not sufficient ground and inducement by the conductor to induce the passenger to believe that the train had stopped. When the train fails to stop at the station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, he does so at his own risk. *Railroad Company v. Massengill*, 328.
7. *Freight. Damage.* A railroad company is not entitled to demand or receive either freight charges or demurrage until it is in a condition to tender a delivery of the goods at a convenient, safe and uninterrupted point at its depot. The legal effect of its undertaking is to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. After notice it may require prompt action on the part of the consignee, but he may demand of it free, convenient, safe and undisturbed access to his goods. *Railroad Company v. Hunt*, 261.
8. *Same. Tender.* A consignee who is ready to pay freight for the goods, on a refusal to deliver them, may maintain trover for the goods, there being no other legal claim upon them, and he is not bound first to make a legal tender of the freight. *Id.*
9. *Demurrage. Lien.* A railroad company has no lien upon goods for demurrage in absence of contract. *Id.*

RAILROAD AGENT.

See CRIMINAL LAW.

RECEIVER.

See LEASE.

1. *Trustees. Attorney's fee.* A receiver of an extinct corporation appointed by act of the Legislature with compensation fixed, may employ

RECEIVER—*Continued.*

counsel to defend or bring suits in relation to his duties, and to pay for such services, yet he cannot, under a retainer by himself, charge the fund for legal services performed by himself. The employment of counsel and the payment of proper allowance for such services, when necessary, require the exercise of a sound discretion on the part of receivers or trustees of the fund out of which the payment is to be made. It would be as unsafe to allow a receiver or trustee to contract with and pay himself for such services as to allow him to purchase the trust property, which it is his duty to sell at the best advantage. *State v. Buller*, 113.

2. *Attorney's fees.* While the receiver, under the act appointing him receiver, may not be entitled to payment for his own professional services, the Legislature has the power to provide, by a subsequent act, that such services may be paid for, even though the services may have been performed before the legislative provision. *Id.*

RESCISSION.

See LEASE; CONTRACT.

REGISTRATION.

Parol proof. A deed takes effect from the date it is noted for registration, and the date of such noting may be proven by parol, even to the correction of a mistake. *Boyce v. Stanton*, 346.

RELEASE OF LIEN.

See VENDOR AND SUB-PURCHASERS.

RENTS.

See CHANCERY PLEADINGS AND PRACTICE; HUSBAND AND WIFE.

RENTS AND IMPROVEMENTS.

See PLEADINGS AND PRACTICE.

REVENUE.

See COUNTY LINES.

REVIVOR.

See PLEADINGS AND PRACTICE.

REVOCATION.

See ATTORNEY, POWER OF.

RIVERS.

1. *Navigable.* Soil below low water-mark. The soil below low water mark of the rivers of this State navigable in a legal sense, as well

RIVERS—*Continued.*

as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the State for the use of the public. *Goodwin v. Thompson*, 209.

2. *Same. Same.* The title to the soil under the waters of such navigable streams cannot be acquired by individuals under our general land laws, and a grant thus obtained, which undertakes to include the bed of such a navigable stream, and to give the grantee the exclusive privilege of taking from the bed of the stream so included sand, gravel, and other deposits found therein, is to this extent void. *Id.*
3. *Same. Same. Quere,* whether the Legislature, under our Constitution or upon general principles, can, by express grant, confer upon an individual the exclusive title to the soil under a navigable stream, especially after the Congress of the general government has undertaken to improve the navigability of the stream. *Id.*

ROAD COMMISSIONERS.

1. *Power to control litigation in regard to roads.* Under the provisions of the act of 1881, as amended, which says, "the road commissioners shall have control of all highways and bridges in their respective districts," the commissioners have no power to control any litigation in regard to the opening of roads. *Harmon v. Taylor*, 535.
2. *Construction of the act of 1881 as amended.* The language of the act must be taken and construed in view of the purpose for which they were created, which was merely as subordinate agents, and the general supervision of the roads remains in the county court. *Id.*
3. *Power of county court to exempt persons from working upon public roads.* The county court has authority to exempt persons from working upon the road, notwithstanding the act of 1881, which requires all persons to work on public roads unless released by the commissioners. *Id.*

SALARY.

See JUDGES, SPECIAL.

SCIRE FACIAS.

See PLEADINGS AND PRACTICE.

SCHOOLS.

1. *Taxes. Municipal corporations.* To establish and provide by local taxation for a system of free schools for a municipality or county, is a county and corporation purpose, within the meaning of the Constitution, Art. 2, sec. 29, which gives the Legislature power to authorize counties and incorporated towns to impose taxes for county and corporation purposes. *Ballentine v. Pulaski*, 633.

SCHOOLS—*Continued.*

2. *Poll tax.* The Constitution, Art. 2, sec. 29, after providing that the State poll tax shall not exceed one dollar, adds: "Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State." *Held*, that a municipal corporation can levy only one such tax, although an amendment to the charter may authorize an additional poll tax for school purposes. *Id.*
3. *Schools. Board of education.* The fourth section of the act of 1885, authorizes the board of education of the town to "permit children living outside of the corporate limits" to attend said schools, upon paying tuition fees, to be fixed by the board. *Held*, permissive, and for the benefit of the school system, by bringing in paying pupils, the effect of which need not be considered until the power is exercised. *Id.*

STATUTES.

1. *Publication.* An act of the Legislature properly passed and regularly approved, does not become invalid by reason of a failure to publish the same among the acts of the Legislature. *Hancock County v. Hawkins County*, 266.
2. *Rule of construction.* Statutes are to be taken as prospective in their operations, unless a contrary intention is clearly expressed upon their face. *Taylor v. Roundtree*, 725.

STATUTES CONSTRUED.

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SUPREME COURT PRACTICE.

See PLEADINGS AND PRACTICE.

1. *Superseding fiat of judge.* The Supreme Court is not authorized by the Code, section 3933, to supersede the *fiat* of a judge awarding a writ of *supersedeas* as incident to a writ of *certiorari* to bring up the proceedings of an inferior to a superior tribunal for revision. *Woods and Todd v. Beaty*, 733.
2. This court has nothing to do with the policy of legislation, if satisfied as to its constitutionality. *Ballentine v. Pulaski*, 633.

SURETY.

See BOND, GUARDIAN.

1. *Debtor. Collateral security.* An indemnity or collateral security, given by a debtor to his surety, inures to the benefit of the creditor, who may subject it in equity without even a judgment against the debtor. *Ray v. Proffet*, 517.
2. *Contribution.* A surety who pays, as between him and other sureties, more than his share of the common debt, is entitled to such contribution from the co-sureties as will meet the equity of the case. *Byram v. McDowell*, 581.

TAXES.

See SCHOOLS.

1. *Land of United States.* Land to which the United States acquire title under a direct tax sale is not exempt from State taxation while so held. *Anderson v. Van Brocklin*, 33.
2. *Same.* The act of the Legislature of March 31, 1885, which provides that all property held or owned by the United States under direct tax sales shall be exempt from taxation while so held or owned, does not apply to taxes then in course of collection by suit, and is probably unconstitutional, except as a statute of limitations. *Id.*

TAXING DISTRICTS.

1. *Second class. Organization.* Under the act of 1881, ch. 127, (new Code, sec. 1677 *et seq.*), the population and territory of a town, whose charter has been repealed, may be organized into a taxing district, by the appointment of commissioners by the county court, upon the petition of a majority of the voters of the district at the time the petition is filed, whether they were voters at the time of the repeal or not, the majority being ascertained by the vote of the last municipal election, as provided by the act. *Pepper v. Smith*, 551.
2. *Same. Motive of petitioners.* The motives of one of the petitioners for the organization of the taxing district could not affect the rights of the other petitioners, if a majority of the voters, nor can the motives of any of the petitioners be inquired into under a bill filed to contest the legality of the organization, nor his character be impeached, and the chancellor properly excluded all such evidence as irrelevant. *Id.*
3. *Same. Act of 1885 construed.* The act of 1885, ch. 82, amending the act of 1881, does not disclose any different legislative intent as to the petitioning voters, even if the subsequent legislation could affect rights already acquired under the previous organization. *Id.*

TENANCY BY CURTESY.

Adverse possession. Successive tenants. It is not necessary to show privity between successive tenants if they are connected and continued in fact, each claiming ownership in connection with his possession, to raise the presumption of deed or grant by twenty years' adverse possession. But when a husband goes into possession under his wife's claim of title, and holds under that claim while she lives, and after her death continues to possess and claim in the same right, there is privity between the successive tenants. Adverse holding may perfect title to an estate less than a fee. *Minns and Wife v. Ewing*, 667.

TENANTS IN COMMON.

See CHANCERY PLEADINGS AND PRACTICE.

1. *Rights of purchasers from.* If some of the tenants in common convey the whole land by deed in fee, the grantee would take the interest of such tenants in common in the land, and partition would be made accordingly. *Morelock v. Bernard*, 169.
2. *Adverse possession. Limitation.* The exclusive adverse possession of land by one tenant in common, or the exclusive receipt of the rents and profits, without demand made by the other tenants, would be evidence of actual ouster, and will vest title if continued for the length of time prescribed by the statute of limitations. *Id.*

TICKET OFFICE.

See CRIMINAL LAW.

TRESPASS.

1. *Damages. Mining.* It is the duty of a person working a coal mine on his own land, near to the boundary line, to make surveys to prevent encroachment on the adjoining land, and to keep accurate accounts of the coal mined near the line, and, if he fail to do so, the evidence as to the quantity of coal taken will be construed most strongly against him, and the least evidence of bad faith on his part would make every intendment in favor of the injured party. *Coal Creek Mining and Manufacturing Company v. Moses*, 300.
2. *Same. Same.* But if such person is shown to have acted fairly, and the trespass is proved to have been unintentional and inadvertent, the measure of damages is the value of the coal *in situ* before the trespass, and the incidental injury, if any, to the land by the taking or mode of taking. *Id.*
3. *Same. Same.* The weight of recent authority, even in actions at law, where the trespass is inadvertent, by one miner on the lands of another, is to limit the recovery to just compensation, and this rule is certainly not changed by bringing the suit in chancery. *Id.*

TRUSTS.

See CHANCERY PLEADINGS AND PRACTICE.

1. *Implied or constructive.* The promise of B., under such circumstances, that if the execution of the order of sale is delayed, and he allowed to sell his portion privately, the proceeds shall be applied to the payment of the vendor's lien and other incumbrances on the whole tract, and the consequent assent of all parties to the delay, and the sale by B. during such delay, constitute a trust-fund out of the proceeds of sale, for the satisfaction of the various encumbrances and the protection of sub-purchasers. *Boyce v. Stanton*, 346.
2. *Assignee of trust-fund.* Any person, and especially the vendor, who receives such fund with knowledge of the facts, giving it a trust character, is chargeable with it as trustee, or with so much of it as comes to his hands. *Id.*
3. *Same. Claim of assignee in bankruptcy.* The character of the fund is not changed by the subsequent bankruptcy of B., and his assignee has no claim upon or right in such trust fund. *Id.*
4. *Funds in trust. Power to dispose of the principal by deed or will. Absolute possession.* A fund in trust for the sole and separate use of a person, with the power to dispose of the principal fund by will or deed to take effect at their death, is not in legal effect an absolute gift, and does not give absolute possession to the extent that the person is entitled to recover the same from the trustee. *Barkley and Wife v. Dosser*, 529.
5. *Trusts created by will or deed, when active.* A will imposing the duty upon the trustee to invest the funds in bonds, etc., and apply the annual dividends or interest to the sole and separate use of a person, is an active or special trust. *Id.*
6. *When a trust estate terminates.* A trust estate terminates when the purpose for which it was created is accomplished. *Id.*

TRUSTEES.

See RECEIVER.

TURNPIKE COMPANY.

See CRIMINAL LAW.

ULTRA VIRES.

See CORPORATIONS.

VENDOR AND SUB-PURCHASERS.

1. *Release of lien.* A. sold to B. a tract of land, which B. cut into lots, and sold the most of them to various sub-purchasers, before he had himself obtained title. After decree of sale to enforce his lien, directing that the portion still held by B. should be first sold, A. re-

VENDOR AND SUB-PURCHASERS—*Continued.*

leased B.'s portion, sufficient in value to pay off his lien, having notice of the sale of the rest to sub-purchasers. *Held*, that A. thereby waived and released his lien on the lots of sub-purchasers. *Boyce v. Stanton*, 346.

2. *Same. Date of estimated value.* The value of the part released, after such decree, estimated in this case as of the date of the release. The fact that B. had quadrupled the relative value of his portion after the purchase, or doubled it after the decree and before the release, does not affect the rule; the full value of the property first liable must be credited as against sub-purchasers. *Id.*
3. *Same. Vendor and mortgagee.* The vendor with a lien occupies toward sub-purchasers from the vendee, and subsequent encumbrances, the same relation as would a first mortgagee to second mortgagee. *Id.*
4. *Purchase pendente lite.* One who purchases portions of such land during the pendency of the vendor's suit to enforce lien, is entitled to the same protection as one who bought before suit brought, provided the vendor has notice of purchase. *Id.*
5. *Same. Injunction.* But if the purchase was made pending an injunction on the original vendee, the same is voidable at the instance of the party suing out the injunction, and against him the sub-purchaser has no such equity. *Id.*
6. *Notice of sub-purchase.* Registration of deed to sub-purchaser is not notice to vendor of the sub-purchaser's equity; but assertion of the same by pleading, or report thereof by the master, or recital thereof in decrees in a cause to which the vendor is a party, will be constructive notice to him. *Id.*
7. *Notes of sub-purchasers.* The holders of the purchase-money notes of such sub-purchasers by assignment from the original vendee are entitled to an equity equal to that of the sub-purchasers, and of the same general character. *Id.*

VENDOR AND VENDEE.

See LIEN.

Contract for sale of land. Election. Where a contract for the sale and purchase of land has been made, conditioned upon the election of the vendee to take by a given day, the vendor may waive performance to the day, and close the trade under the contract. *Bank v. Bradley*, 279.

VENUE.

See CRIMINAL LAW.

WAREHOUSE RECEIPTS.

1. *Act of Assembly.* The warehouse act of 1879 is not in violation of Section 17, Article II, of the Constitution. *Bank v. Haselton*, 216.
2. *Effect of.* Warehouse receipts, issued in accordance with said act, are negotiable, and vest the holder with title to the property described in them. *Id.*
3. *Description of property.* A warehouse receipt which describes the property as "50,000 pounds of bar iron, assorted, made at the Vulcan Works" is sufficient, though the property is stored in mass with other property of the same kind, so as not to be susceptible of identification by mark or otherwise. *Id.*
4. *Possession of warehouseman.* It is not fatal to the receipt that the property was in the warehouse of the manufacturer (the pledgeor), provided that a regular warehouseman have the same rented, and the actual, exclusive custody of the same. *Id.*
5. *Loan and exchange of property.* Nor is it fatal to the receipt that the warehouseman lent the pledgeor property covered by a receipt, on his promise to return a like quantity of similar kind, provided the same is returned and stored before it is seized by an attaching creditor. *Id.*

WIDOW.

See DOWER.

WILLS.

1. *Legatees to take per capita. When.* Under a bequest to particular children and grand-children equally, the legatees will take *per capita*, in the absence of anything in the will showing a different intent. *Kimbrow and Wife v. Johnson*, 78.
2. *Legacy. Interest.* A testator by his will directed his executors to set apart the sum of \$20,000 in gold, and let it remain as so much unproductive capital, not even lending it on interest, and on the day that his great-granddaughter (naming her) arrived at the age of twenty-one years to pay over to her the said sum in gold as a birth-day present, the legacy not to vest in her until that day. The executor collected the requisite amount of funds, and then loaned the same on time, at the rate of ten per cent. per annum, payable in gold. *Held*, that the legatee was entitled to the interest. *Whitworth v. Ewing*, 595.
3. *Construction.* The testator devised and bequeathed the residue of his estate to his executors, who are also made testamentary trustees, in trust to keep the estate together to the best advantage, the interest, rents, issues and profits to be appropriated for the education, benefit, support and maintenance of his said great-granddaughter, then an

WILLS—Continued.

infant, for and during the period of her natural life, for her sole and separate use, her receipt to be a good voucher to his executors "for said interest, rents, issues and profits, and the same" not to be liable for the debts of any husband, and, upon her death leaving issue, the executors are to convey "the *corpus* of said estate devised to them as aforesaid in trust," unto such issue; but should she die without issue living, then "the *corpus* of said estate, including any interest, rents, issues and profits, not used or appropriated for the benefit of said great-granddaughter, and also including said legacy of \$20,000 in gold, should the same not have vested," to be disposed of to certain other persons in remainder. *Held*, that the will, in the contingency of the first taker leaving issue, gave to her all the "interest, rents, issues and profits" of the estate, and that there is not enough on the face of the will to show a change of intent in the contingency of not leaving issue. *Id.*

4. *Devise upon condition precedent.* A devise of land to the children of the testator's daughter "on condition" that the daughter release the estate of the testator from all liability to pay a note which the daughter holds, is a devise upon a condition precedent, and no title to the land vests in the children until the condition is complied with. *Howard v. Wheatley*, 607.
5. *Same. Rights of creditors.* The rights of a creditor of the estate to the land thus devised, acquired under judicial proceedings, to which the testator's daughter was a party, claiming as the heir of the father, cannot be affected by a subsequent offer to comply with the condition imposed by the devise. *Id.*
6. *Same. Same. Lien.* Nor would a prompt compliance with the condition affect the lien of a creditor on the land acquired in the life-time of the testator, nor the rights of a general creditor properly prosecuted. *Id.*
7. *Debts and funeral expenses. Marshaling assets.* A direction by the testator, in the first clause of his will, that his funeral expenses and debts be paid as soon after his death as possible, out of any money he may die possessed of, or that may first come into the hands of the executor, followed by a specific legacy of the testator's personal property, and notes and money, is not such a charge of the debts upon the personal estate as will prevent the legatees from marshaling the assets, and throwing the burden of the debts upon undivided realty. *Douglass v. Baber*, 651.
8. *Expenses of contest a charge against the estate.* The expenses of a contest over the validity of the will instituted by the heirs, as well as the expenses of administration, including counsel fees, constitute proper charges against the estate, and a legatee whose legacy has

WILLS—Continued.

been taken for their payment may marshal the assets for his indemnity. *Id.*

9. *Marshaling assets. Debts.* The cause of action of a legatee or devisee to marshal assets accrues when the property devised is taken to pay the debts of the estate. *Id.*

10. *Beneficial interest. Claims affecting the operation of a will.* It is a well established rule in equity, that a man shall not take any beneficial interest in a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will. *Williams v. Williams*, 438.

11. *Construction.* A testator, by his will, charged the property given to his children with a "comfortable support" for his two widowed sisters, (who had been living with their children on one of the testator's plantations and been supported by him), "equal to what they now have," so long as they shall live unmarried, "or shall have need of this aid." *Held*, that the will created a trust in favor of the sisters for a fixed support in board, lodging and clothing, such as they were receiving from the testator at the date of the will, without reference to the performance of services by them, such as they had been in the habit of rendering during their brother's life, until they married, or until there was such a change in their pecuniary condition as to render the aid unnecessary. *Held*, also, that a discretionary power, conferred upon the executor by an independent item of the will, to see to the support of the sisters, and "fix the amount thereof in his discretion," which was never exercised, would not affect the trust. *Alsup v. Clarke*, 71.

WITNESS FEES.

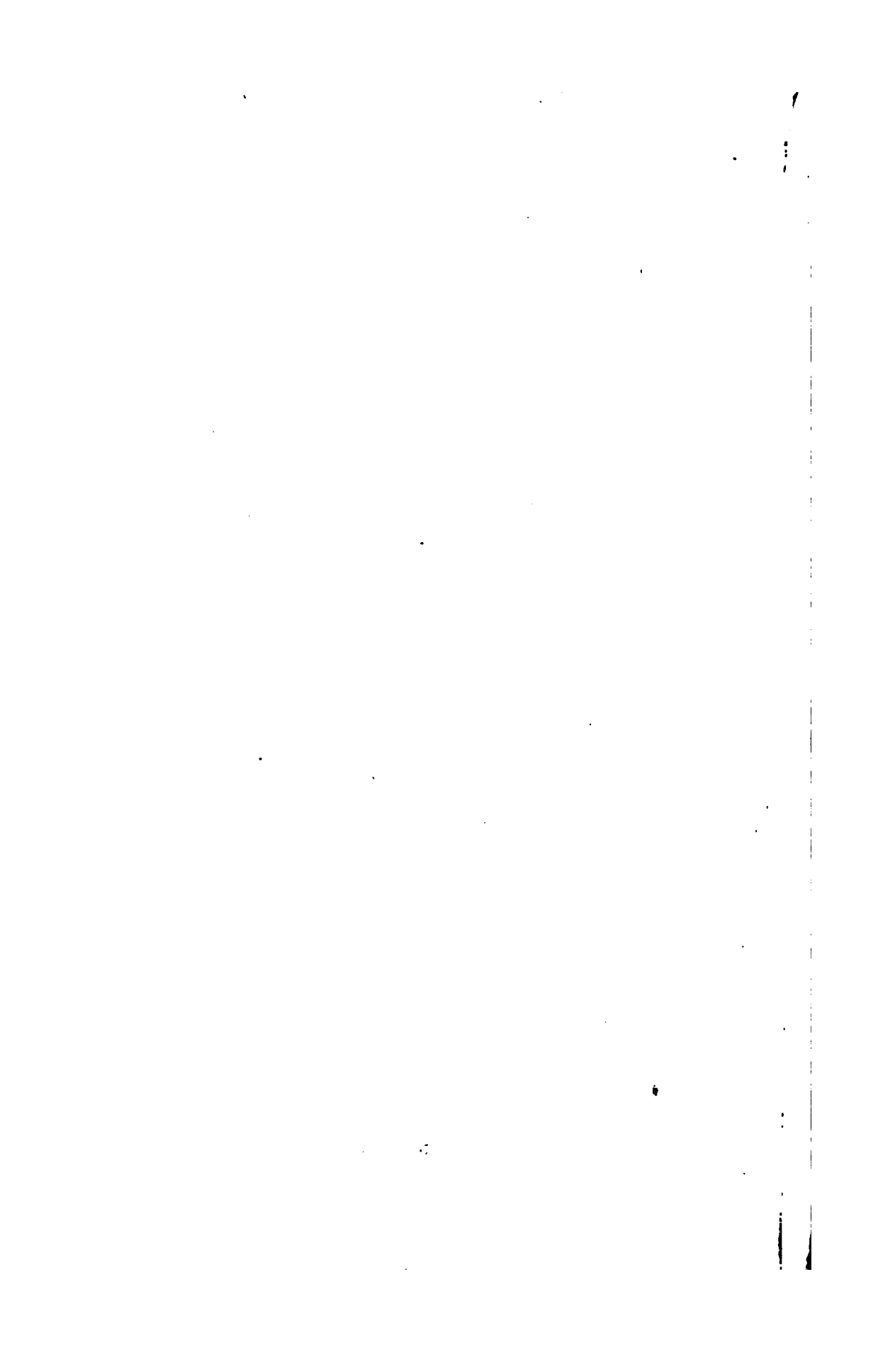
Criminal cases. A witness cannot prove attendance at any one term of the court in more than two criminal cases, although the terms of the court may have greatly lengthened since the passage of the statute prescribing the restriction, and the cases have been tried at different times during the term. *State v. O'Haver*, 46.

WORKHOUSE.

See CRIMINAL LAW.

WRIT OF ERROR.

See PLEADINGS AND PRACTICE.



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